Supreme Court

OF THE

United States

October Term, 1926

No. 827

ELLSWORTH KELLEY,
Plaintiff in Error,
vs.
THE STATE OF OREGON,
Defendant in Error.

In Error to the Supreme Court of the State of Oregon.

BRIEF OF THE PLAINTIFF IN ERROR ON PETITION FOR REHEARING

The Court uses this language in its opinion:

"Another assignment of error is to the effect that the plaintiff-in-error was constantly in the custody of the warden of the penitentiary, inside and outside of the court room during the trial. It is argued that he was entitled to be free from any custody in order that he might fully make his defense,

> and that this deprived him of due process. It is a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary for a felony and while there commits a capital offense must, in order to secure a fair trial, be entirely freed from custody."

It was not argued that the defendant was entitled to be free from any custody in order that he might fully make his defense, and that this deprived him of due process. We agree that it is a new and would be an untenable assignment to say that a defendant, in order to secure a fair trial, be entirely freed from custody. That was not our point. The point is stated and argued in our brief, on page 20, et seq.,

Federal Question No. 1. A careful reading of that will show that our contention was not that he should have been free from any and all custody, but that he should have been in the custody of the court, and not in the custody of the warden of the penitentiary.

The question, therefore, for the Court to decide, and which it has not decided, because it has misapprehended the point, is this: Is it due process of law when a trial is had when all the time the defendant is in the legal custody of the warden of the penitentiary, an officer of the executive department of the state, and under the legal dominance, mental and bodily, of the warden, and not in the legal custody of the court or under the protection of the court at any time? That is the question we propound for decision.

The opinion of the Oregon Supreme Court so states. The record in this cause shows, by certified copy, the commitment to the warden of this defendant by regular order of a court. Nothing in this record shows that any other order of the court, or any process of any court, took the defendant from that custody. And, as argued on page 20 of the brief, this amounts to a question whether or not he was within the jurisdiction of the court to try. We refer again to the argument in our brief on that point for a clearer presentation of the question than the Court has given in its opinion. State v. Wilson 38 Conn. 126, and all authorities we have been able to find hold that it is essential to the jurisdiction of the court that the defendant in prison must be taken from the custody of the executive department (its warden of the prison) and placed in the exclusive charge of the court. It was there held that such is presumed in the absence of a showing to the contrary. This showing appears of record from the evidence produced by the state. Besides as held in State v. Gilbert, as early as 1883, (printed in 1910, 55 Oregon Reports) followed in State v. Walton, 50 Oregon 142; 13 L. R. A. (N.S.) 811, citing Crain v. United States 162 U. S. 625 that such jurisdictional matters **must affirmatively appear of Record,** which as indicated does not appear in the case at bar.

Nor did we argue, as implied in the opinion, that a defendant cannot be tried and convicted of a capital (or any) offense while serving a term

in prison; but contended and still maintain, that when under a statute, as in Oregon, the one convicted of a capital offense must serve at least twenty days in prison before execution.

Section 1576 of Olson's Oregon laws specifically provides that if a defendant is convicted of two or more crimes "the judgment shall be that the imprisonment must commence at the expiration of the term limited by such previous judgment." That was not done in this instance.

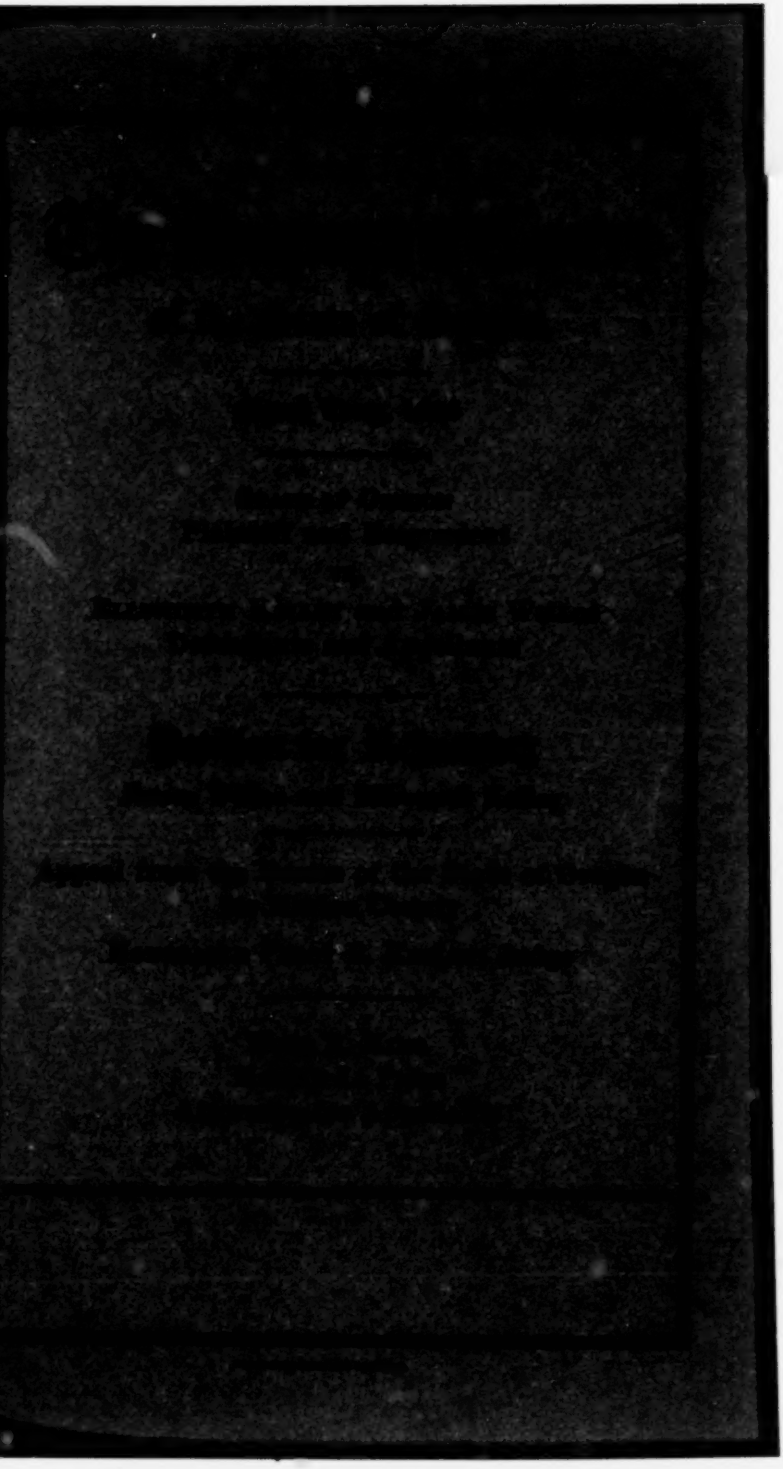
We did not, as implied in the opinion, argue that one convicted while serving a prison sentence cannot be executed under the law; but did and do contend that **when it is provided by statute,** as in this instance, defendant must serve a twenty-day sentence at least before being executed, and that he is entitled to serve the twenty days, whether it be in jail or elsewhere, before such execution may be invoked. And the twenty day incarceration prior to execution must begin, as provided by the statute cited, before the execution may take place. The time for the twenty day period to begin to run must accordingly be at the expiration of the sentence imposed and for which he was serving prior to the commission of the crime and at the time of setence. This can be prevented only by commutation or by acceptance of a pardon, not involved here, by reason of which authorities cited in the opinion on that feature are not in point. None of them, as I take it are under a statute similar, either in wording or effect, to that of the section of the Oregon laws above cited.

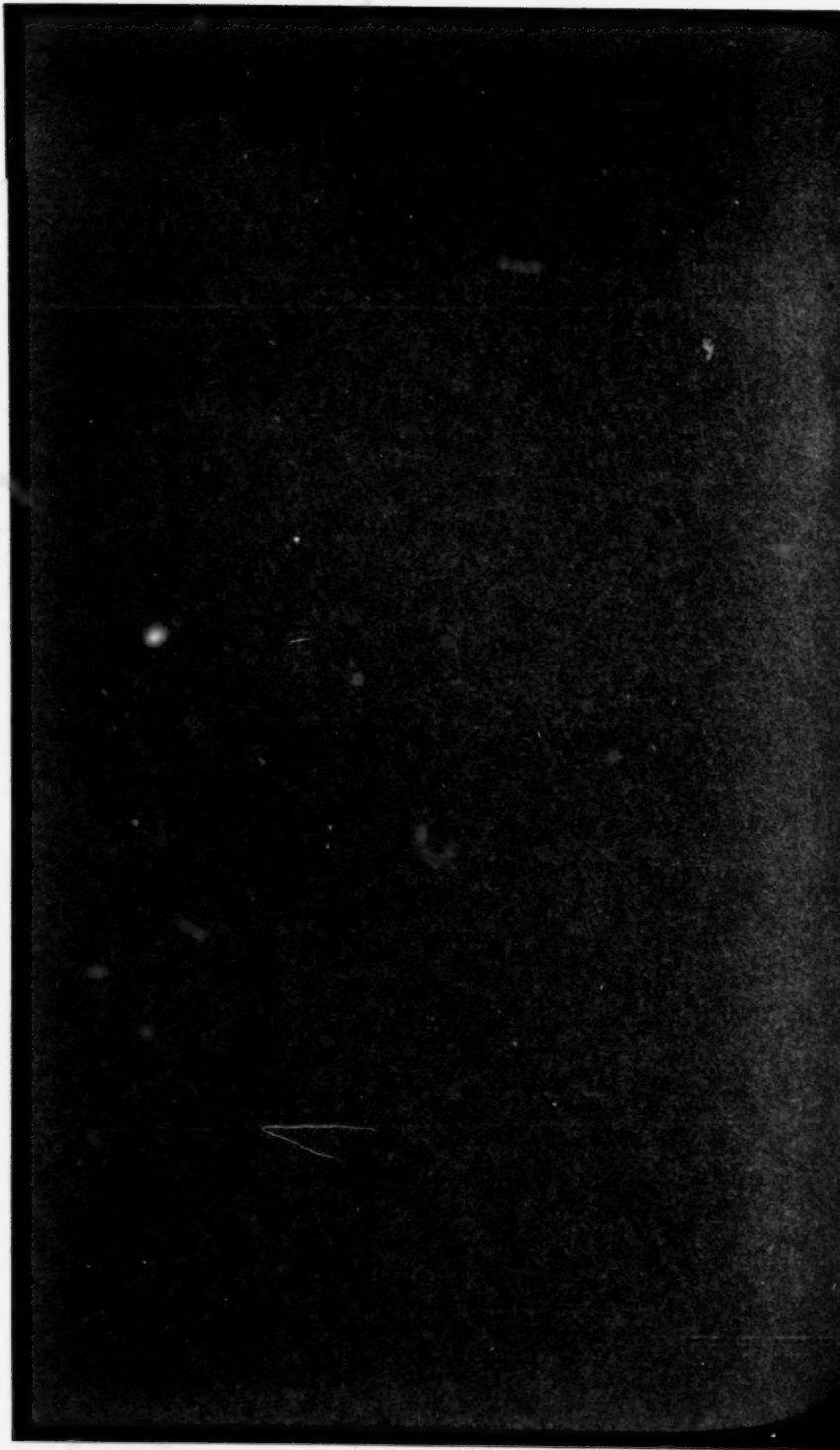
Excerpts are given in the opinion on this point from the opinion of the court below. The third and lengthy paragraph thus quoted seems to imply that we argued that one is exempt from punishment during the term of his former imprisonment, overlooking that this may be done by commutation of the sentence, or by accepted pardon, which does not appear here.

The fallacy of the statement is manifest, so far as license to commit crime, etc., which is highly misleading and unjustified, when it is asked what would be the effect in that regard where capital punishment is abolished as it was in Oregon for several years? Could it be said that conviction for another life sentence would license one to commit crime with immunity? It could at least be said the more the crimes the less the opportunity to secure executive clemency for either. Again: since the opinion appealed from is the one from which this writ of error, or certiorari, as case may be, is taken the opinion cited and quoted can hardly be deemed an authority for its own affirmance.

Feeling that our position not only on the foregoing points, but on other vital points as well, have been very much misunderstood, a rehearing is earnestly requested.

WILL R. KING,
Attorney for Ellsworth Kelley.





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IN

The Supreme Court

of the State of Oregon

March Term, 1926

STATE OF OREGON
Plaintiff and Respondent

vs.

ELLSWORTH KELLEY and JAMES WILLOS
Defendants and Appellants

PETITION FOR REHEARING

Come now the appellants, Ellsworth Kelley and James Willos, and respectfully move the Court for a rehearing in the above entitled cause.

As grounds for the motion the appellants allege that the Court erred in the following particulars:

1. In holding that the Court would not notice or decide whether or not the Court below erred in its instructions defining robbery. The particular instructions are the three set out in full in the brief filed herewith in support of this motion.

2. In holding that because the said instructions were not excepted to by the appellants the Court would decline to notice them.

3. In holding that the rulings of this Court requiring exceptions to instructions, or other errors, were applicable to the instructions here complained of.

4. In not holding that no exception was required to give this Court jurisdiction to hear and determine the question of error assigned, because the error was one that could not be waived by the appellants.

5. In not holding that each of the said instructions was reversible error, and in not reversing the judgment by reason thereof.

6. In admitting in evidence the stenographic report of the questions and answers of Ellsworth Kelley and James Willos, taken at the penitentiary, over the objection of the appellants' counsel that there was no evidence that the said statements were voluntary.

7. In holding that the said statements were voluntarily made, in the absence of a showing to the contrary in the bill of exceptions.

8. In holding that it would be presumed that there was other evidence that the statements were voluntarily made, not appearing in the bill of exceptions.

9. In holding that it was the duty of the ap-

pellants, if there was other such evidence, to have it incorporated in the bill of exceptions, instead of holding that it was the duty of the District Attorney, if there was any such evidence, to see that it was incorporated in the bill of exceptions.

10. In holding that the said statements did not constitute confessions, but only admissions, and in holding that the exculpatory matter in the said statements reduced them from confessions to admissions.

11. In not holding that the facts stated by each of the appellants in their said statements were acts involving and implying the guilt of the appellants of some degree of the crime charged and of an element of such crime.

12. In holding that the admission by both of the appellants that they planned together with Jones and Murray to escape from the penitentiary was not a confession of an element of the offense charged.

13. In holding that the failure of the District Attorney, when the evidence of each appellant was taken at the penitentiary, to inform the appellants of their right to counsel and of their right not to make any statements, and that if one was made by them it could be used against them on the trial, did not make the statements so procured incompetent and inadmissible as evidence against them on the trial.

14. In not holding that the proceeding taken at the penitentiary was extra-judicial and extra-legal and void for every purpose, and the evidence so procured incompetent to be used against the appellants, or either of them.

15. In holding that no statement was taken at the Oregon Penitentiary of the defendant Willos at the same time and place and under the same circumstances as the taking of the statements of defendant Kelley, referred to in the foregoing assignments numbered 6 to 14, inclusive.

16. In holding that the only appearance in the record of any statements by defendant James Willos was when he was called as a witness in his own behalf.

17. In sustaining the trial court's refusal to give the instruction requested in appellants' assignment number 26 (Bill Ex. p. 53; quoted on p. 22 of brief on appeal).

18. In sustaining the trial court's refusal to give the instructions requested in our assignment number 24 on appeal (Bill Ex. p. 51) to the effect that if found that cruel and unusual punishment was being inflicted upon them within a reasonable time prior to the prison escape in which Sweeny was killed, and defendants were living in enforced belief of continuous repetition thereof, and that escape was the only

means of avoiding believed great bodily harm, the jury could take same into consideration in arriving at their verdict, or verdicts, etc.

19. In holding that the only testimony bearing upon questions involved in the last error above assigned (number 18) was limited to that stricken out, given by Tom Murray, mentioned on page 977 of opinion, as our fifteenth assignment of error; and in not considering in connection therewith the testimony given at the trial of both Kelley and Willos, defendants, as disclosed by reference thereto on page 52 of Bill of Exceptions, and as set out on pages 55 to 77 inclusive, in Bill of Exceptions.

20. In application of the usual rules and law applicable to the plea of self defense, where the controversy, or combat, is immediately between individuals to the facts disclosed by the testimony given by defendants, Kelley and Willos, respectively, in which there was presented to the jury for consideration a long series of events disclosing cruel and unusual treatment by which defendants were placed in constant fear of great bodily harm and ultimate death, and in not holding there was error in the court's refusal to instruct the jury relative to the law applicable to the conditions thus presented by the evidence.

21. In not distinguishing between conditions affecting accused where the treatment cruelly invoked upon the person of defendants

incarcerated within prison walls under the enforced restrictions, where the compliance with the law and usual requirement of first retreating to the wall, etc., usually invoked in ordinary and usual homicides, before the killing was, by the confinement within prison walls, made impossible.

22. In holding and recognizing that the defendants were within the jurisdiction of the trial court when tried; and in not holding that under the evidence adduced, as disclosed by the record, defendants, when tried, were within the exclusive jurisdiction of the Warden of the Oregon Penitentiary.

23. In holding that the execution of the sentence imposed could be made effective, prior to the expiration of the terms of imprisonment for which confined as disclosed by the record.

ARGUMENT

The Court has affirmed a sentence of death on the sole ground that the appellants consented to it. The appellants contended at the hearing that the court below instructed the jury that they might find the appellants guilty of murder in the first degree upon facts that do not constitute that crime. The Court declines to notice the contention, or to decide the question. It does so on the ground that the appellants did not except to the instruction. The only purpose of an

exception is to show affirmatively that the accused did not consent to the instruction.

The accused cannot consent to the creation or definition of a crime that is not defined by the Legislature. That body is the only power in the State that can define a crime. The Court cannot do that, with or without the consent of the accused.

8 R. C. L. 58.

State v. Ayers, 49 Or. 61-66.

State v. Vowels, 4 Or. 324.

State v. Gaunt, 13 Or. 115.

State v. Nease, 46 Or. 433.

The failure to except to the ruling of the Court is held to raise a presumption of consent, but no presumption can be indulged that an accused person, on trial upon a plea of not guilty, has consented to be convicted on proof of facts that lack an essential element of the crime.

A waiver of such an error, expressly made, would not be accepted by the Court. That is so, not only because the public has an interest in the life and liberty of every person, but because the statute expressly forbids a sentence of death upon the confession of the accused only.

I hope to make these propositions clear, but before entering upon that discussion I wish to show to the Court, from the record before it, that the lower Court did in fact authorize the jury to

find a verdict of guilty against the appellants of murder in the first degree on facts that do not constitute that crime.

The indictment charges the appellants with killing Sweeney of deliberate and premeditated malice. The Court instructed the jury that if the killing was done with deliberation and premeditation by the appellants they could convict them of murder in the first degree. But the Court also instructed the jury that if the killing was done without premeditation and deliberation, but in the perpetration of a robbery, they could find them guilty of murder in the first degree. So the instructions were alternative, either to convict upon proof of deliberation and premeditation, or to convict without premeditation or deliberation upon finding that the killing was done in the perpetration of a robbery.

Let the instructions show for themselves that this statement is literally correct. The Court instructed the jury as follows:

> "Where the killing, if any, is *not done* in the perpetration of rape, arson, robbery or burglary, in order to constitute murder in the first degree it must appear that such killing was committed purposely and of deliberate and premeditated malice."

And the Court further instructed the jury as follows:

> "The crime charged is murder in the first degree. The statute of the State pre-

scribes that if any person shall purposely and of deliberate and premeditated malice, *or* in the commission or attempt to commit rape, arson, robbery or burglary, kill another, such person shall be deemed guilty of murder in the first degree."

And then the Court instructed as follows:

"In order to constitute murder in the first degree, where the killing is done in the perpetration of a rape, arson, robbery or burglary, *it is not necessary* to prove expressly either a purpose to kill or deliberate and premeditated malice."

The same idea is again repeated in the instructions, as follows:

"*For the purposes of this case*, the material and necessary elements of murder in the first degree are as follows: 1. . . . 2. Either that John Sweeney was killed purposely and of deliberate and premeditated malice, *or* that John Sweeney was killed while the one or ones who did the killing were committing or attempting to commit the crime of robbery."

Since the crime of robbery became an essential element in the crime of murder in the first degree under the instructions, the Court undertook to inform the jury what robbery was. Following are the instructions defining robbery:

"Robbery is the felonious taking of property from the person of another by force. The personal possession of the property by the person robbed may be actual or construc-

> tive. If the property is in his presence or control, though not on his person, it is sufficient."

And then immediately the Court proceeded to tell the jury specifically what was a felonious taking, as follows:

> "If a man knocks another down and takes from him property so in his presence and control, it is robbery. That is the well-established rule of law."

But that is not the well or otherwise established rule of law. An essential element of the crime of robbery is an intent to steal the property. Robbery is an aggravated larceny. The *animus furandi* must exist, and it must exist at the time of the forcible taking or it is not robbery. If, without such larcenous intent at the time, the property was afterwards taken with intent to steal it, it may be larceny or larceny from the person, but it is not robbery. The instruction so far is sufficiently explicit to justify the jury, in following it, to find the appellants were guilty of robbery if they found that they knocked a man down and took property away from him without a larcenous intent to steal the property, and to justify the jury, if they followed the instruction, in convicting the appellants of murder in the first degree if they found that they killed Sweeney in perpetrating this violent trespass. But the Court, *ex industria*, was no

less explicit in the following instruction:

> "When a person takes with force or violence the goods of another, or goods which are under another's rightful custody and control, from the person or presence of the owner or person in the rightful custody and control thereof, and against his will, the person so taking them has committed robbery. It constitutes robbery so far as to render the perpetrator liable to conviction for it."

It will be noticed that these instructions do not purport to designate a violent taking of property as merely one of the elements of robbery. The instruction purports to give *all the elements* constituting robbery. These repeated definitions, so explicitly given, are incurable, short of an instruction just as explicitly withdrawing them. Even a correct definition otherwhere given in the instructions would not cure them, because it would be a case of contradictory instructions, and the Court could not know whether the jury followed the correct or the erroneous instructions. (Authorities below.)

The only other instruction in connection with the definition of robbery that was given was as follows:

> "And if in pursuance of such conspiracy, and in furtherance of a common object, the defendants on trial aided Murray and Jones, and one or more of the conspirators committed the crime of robbery by assaulting the turnkey and knocking him down, and

> by force and violence taking and stealing from his custody and in his presence personal property, if any, in said turnkey's lawful charge and control, namely, guns and ammunition, and while engaged in the commission of such robbery, if any, one of such conspirators shot and killed John Sweeney with a pistol, in Marion County, Oregon, about August 12, 1925, and before August 28, 1925, then defendants on trial, unless they were legally insane at the time, are guilty of murder in the first degree, although neither of the defendants on trial fired the fatal shot which caused the death of John Sweeney."

If we construe the word "steal" occurring in that definition as importing or implying larcenous intent *at the time of the assault,* yet it would be an instruction contradicting the previous definition of robbery, and for that reason would be error. But the instruction itself is not susceptible of a construction that the larcenous intent must accompany the violent taking. The previous explicit definitions of robbery follow the word robbery wherever it subsequently occurs in the instructions. When the jury are told in the last preceding instruction that they may find the defendants guilty of murder in the first degree if one of the conspirators killed Sweeney "while they were all engaged in committing a robbery," the jury must have understood by the word robbery what the Court had previously told them it meant, that is to say, knocking a

man down and taking property away from him without requiring any intent at the time to steal it. The jury must have understood that if the appellants, after the taking, conceived the intent to steal and did steal the property, that that constituted robbery.

A constituent element of robbery is the intent to steal, formed at the time of the taking.

> "In robbery, as in larceny, it is essential that the taking of the goods be *animo furandi,* and unless the taking be with felonious intent it is not robbery."
>
> 28 R. C. L. 1149, Sec. 15.

To that text are cited:

State v. Holloway, 41 Ia. 200; 20 A. R. 586.

Jones v. State, 95 Miss. 121; 21 Ann. Cas. 1137 and Note.

Latimer v. State, 55 Neb. 609; 70 A. S. R. 403.

Hope v. People, 83 N. Y. 418; 38 A. R. 460.

Comm. v. White, 133 Pa. St. 182; 19 A. S. R. 628.

Glenn v. State, 49 Tex. Cr. 349; 13 Ann. Cas. 774.

We also cite the Note to *State v. McCune,* 5 R. I. 60, 70 Am. Dec. 176, 178. Mr. Bishop is quoted to the effect that "robbery is larceny committed by violence from the person of one put in fear." 2 Bishop's Criminal Law, Sec. 1156.

And the same note uses this language:

"Robbery is said to be a compound larceny, composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking."

"The indictment for robbery charges a larceny." 2 Bishop's Criminal Procedure, Sec. 1002.

And the note, on page 188, says:

"The final constituent element of robbery is the *animus furandi.* The taking must be with the intent to appropriate the property likewise as in larceny."

Citing:

People v. Keefer, 2 West Coast Rep. (Cal.) 878.

Long v. State, 12 Ga. 293.

Ward v. Comm., 14 Bush. 233.

Murphy v. People, 3 Hun. 114.

Hammond v. State, 3 Coldw. 129.

And the instructions defining robbery must include the larcenous intent.

Jones v. State, 95 Miss. 121; 21 Ann. Cas. 1137.

In that case the Court instructed the jury:

"If the jury believe from the evidence, beyond a reasonable doubt, that Albert Jones feloniously took the pistol of E. S. Steen, in his presence or from his person and against his will, by violence to his person or by putting Steen in fear of immedi-

> ate injury to his person, as charged in the indictment, then it is the duty of the jury to find the defendant guilty as charged in the indictment."

It will be noticed that in that instruction the word feloniously is used. The Court held the instruction was error for not including specifically the larcenous intent in the taking. This case quotes from *Wood v. State,* 6 So. 207, where a similar instruction was held to be erroneous.

In *Sledge v. State,* 99 Ga. 684, the Court said:

> "The definition of robbery, as expressed in Section 151 of the Penal Code, is inaccurate for want of fullness. It omits the felonious intent as a constituent element of the offense. The *animus furandi* is as much involved in the commission of a robbery as in the commission of a larceny. It is as necessary to be alleged and proven in the one case as in the other. There can be no robbery without an intent to steal; and hence it is legally impossible for the trial judge to give to the jury correct instructions upon the trial of a robbery case, which leave entirely out of view the question of felonious intent. It is not one of those collateral matters concerning which the Court is only required to instruct the jury upon request, but it is of the very substance of the offense, and an omission so to instruct the jury would enable them to convict the accused without finding the felonious intent. This Court has repeatedly ruled that upon that class of questions the trial judge should instruct the jury without request."

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In *State v. O'Connor,* 105 Mo. L. C. 126, the Court said, speaking of the instruction:

> "It has all the elements of robbery except the felonious intent, which is omitted. To constitute robbery the property must be taken from the person by force or putting in fear, against the will of the owner, with the intent to deprive the owner of it, and without any honest claim to it on the part of the taker. In other words, the taking must be with intent to steal."

The instruction was held erroneous.

In *State v. McLain,* 159 Mo. L. C. 352, the Court said, speaking of the O'Connor case:

> "In that case, the instruction which was condemned simply told the jury that if the defendant assaulted William Franke, and by force and violence to the person of him, the said Franke, took from the person of him, the said Franke, against his will the watch named in the indictment, etc., they would find him guilty, regardless of the intent with which the offense was committed, and it was held to be erroneous. The only difference between the instruction passed upon in that case, and the instructions complained of in the case at bar, is in the use of the words wilfully, feloniously, and violently in this case, which is claimed by the state to be sufficient. But in order to constitute robbery, the property taken must be with intent to steal, or to deprive the owner thereof, and the words used in the instruction do not necessarily import such a taking. If the announcement of the rule in

these cases is longer to be followed, instruction numbered one, as given in this case, must be condemned for failure to submit an essential element of the offense to the jury. This is simply the recognition of an old and well settled principle in criminal law, and there is no good reason suggested why it should be departed from, and we are unwilling to do so."

Whatever the statutory definition may be in other states, the intent to steal is made by our statute an element of the offense. Robbery by putting in fear, not being armed with a dangerous weapon, is defined as follows:

> "If any person, not being armed with a dangerous weapon, shall, by force and violence, or by assault, or by putting in fear of force and violence or assault, rob, steal or take from the person of another any money or other property which may be the subject of larceny, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than three nor more than fifteen years."

And robbery, being armed with a dangerous weapon, is defined as follows:

> "If any person, being armed with a dangerous weapon, shall assault another with intent, if resisted, to kill or wound the person assaulted, and shall rob, steal or take from the person assaulted any money or other property which may be the subject of larceny, such person, upon conviction thereof, shall be punished by imprisonment in

> the penitentiary for a period of not less than ten years, or during the natural life of such person so convicted. . . ."

Larceny by stealing from the person is defined as follows:

> "If any person shall commit the crime of larceny by stealing from the person of another, such person shall, upon conviction thereof, be punished by imprisonment, etc."

In the case of *State v. Lawrence,* 20 Or. 236, the indictment charged, in effect, the defendant with assaulting one Leabo, and putting him in fear and taking from him, forcibly, a silver watch of the value of $10. The Court held this indictment was not good. The Court said:

> "The defendant may have used force and violence, or assaulted the prosecutor, or put him in fear of force and violence or assault, yet if he did not rob, steal or take from the person the property in question by some one or more of the means enumerated, the crime is not made out."

In *State v. Parr,* 54 Or. 316, it is said that robbery is "larceny aggravated by the circumstance that the property asportated was taken from the person of another by violence or putting him in fear."

To justify the verdict, the jury must find a larcenous intent at the time of the taking. But the instructions relieve them of that necessity.

> "A guilty intention may be inferred from the act, but this in principle is an inference of fact to be drawn by the jury and not an implication of law to be applied by the court."
>
> 8 R. C. L. p. 61, note 13.

It was error, therefore, to take the question away from the jury.

If the Court should be of the opinion that the last instruction on robbery implies that the larcenous intent existed at the time of the taking, it is contradictory to the previous definitions of robbery. Contradictory instructions constitute error.

> *State v. Miller,* 43 Or. 325; 74 Pac. 658.
> *State v. Howard,* 41 Or. 49; 69 Pac. 50.
> *State v. Hill,* 63 Or. 451; 128 Pac. 441.
> *Mills v. U. S.,* 164 U. S. 644, 649; 17 S. C. Rep. 210, 41 L. Ed. 584.

The rule here relied on is a specific illustration of the more general proposition that the total failure to prove any essential element of the crime charged is fatal to conviction, and an instruction which authorizes a conviction upon facts omitting an essential element of the crime is fatally bad.

In the case of *State v. Carver,* 22 Or. 602, the defendant was convicted of murder in the first degree. The Court below instructed as follows:

> "An intent to murder is conclusively pre-

> sumed from the deliberate use of a deadly weapon causing death within a year. Hence, if you find from the evidence, beyond a reasonable doubt, that the defendant purposely and maliciously killed deceased by the deliberate use of a deadly weapon causing death within a year, then your verdict should be guilty."

The Court held this instruction manifestly erroneous. It said:

> "It authorized and directed the conviction of the defendant of murder in the first degree upon proof only of murder in the second degree. The instruction entirely omits all the necessary requisites and distinguishing features of murder in the first degree, and substitutes therefor the presumption arising from the deliberate use of a deadly weapon. It correctly defines murder in the second degree only, and yet the jury must have understood that if the case as stated in the instructions was shown by the evidence, they must find the defendant guilty as charged."

In the case of *State v. Scott,* 63 Or. 444, the charge was extortion. The Court upheld the sufficiency of the indictment, which charged that the threatening letter was communicated to Mr. Gallagher. The letter was sufficiently proved to have been written by the defendant. The Court there distinguishes between the indictment and the proof. The Court below gave the following instruction:

> "However, upon the other hand, if you are satisfied beyond a reasonable doubt, after having considered all the evidence submitted in this case, that the defendant wrote the instrument of writing which is in evidence here and set forth in the indictment, or the communication was delivered to Mr. Gallagher, it would be equally your duty to find the defendant guilty of the crime charged."

The Court held the instruction to be error and that both the "authorship and promulgation of the offending document must be brought home to the defendant," and that it was possible to convict the defendant of the delivery of the communication by someone else without the authority of the defendant. That was a case where the jury were authorized to find the defendant guilty of facts that do not constitute the crime.

In the case of *State v. Wong Si Sam*, 63 Or. 266, the question arose under Section 1540 L. O. L. to the effect that a conviction cannot be had upon the uncorroborated evidence of an accomplice, but there must be evidence tending to show his connection with the commission of the crime. The Court below read that definition from the statute, but proceeded at length to instruct the jury to the effect, as held by the Court, that he might be convicted without other evidence than the accomplice tending to show his connection with the crime. The Court said the reading of the statute was qualified by the other instruc-

tions. It was a case where essential proof was lacking.

In the case of *State v. Hill,* 63 Or. 451, the question was as to an instruction requested, as follows:

> "Before you can convict this defendant you must believe beyond a reasonable doubt that he is guilty of or in complicity with the original taking, and any subsequent connection after the taking would not be larceny, no matter whether in good or bad faith, and if you believe that this defendant received the horses in question from Walter Hill, or any other party, after the felonious taking, whether in good or bad faith, he is not guilty of larceny, and you must acquit him."

The Court said it was error to refuse that instruction. It is also a case where the instruction given by the Court submitted to the jury to find the defendant guilty of larceny without a larcenous intent at the time of the taking. The case is in point on the general proposition now under discussion, and also strongly in point on the necessity of including in the instruction a larcenous intent at the time of the taking.

The Court refuses to pass upon the question here presented because the defendants did not take an exception to the instructions complained of. Now, the cases are in accord that the total failure to prove an essential element of a crime is fatal to a conviction, and no more needs an

exception than a bad indictment. This is so, first, because the public has an interest in the life and liberty of the accused which he cannot be deprived of except upon proof of facts constituting a crime.

State v. Godager, 56 Or. 205; 108 Pac. 185.
Hopt v. Utah, 110 U. S. 574 (4 S. C. R. 202, 28 L. Ed. 262).
Crane v. United States, 162 U. S. 625 (16 S. C. R. 952; 40 L. Ed. 1099).
State v. Walton, 50 Or. 142 (13 L. R. A. N. S. 817; 91 Pac. 490).

In the Walton case the case of *Hopt v. Utah* is cited with approval by this Court. The language in *Hopt v. Utah* is as follows:

> "The public has an interest in his life and liberty and neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life and liberty cannot be dispensed with or affected by the *consent of the accused*, much less by his mere failure, when on trial and in custody, to *object to unauthorized methods.*"

And in the second Walton case, *State v. Walton*, 51 Or. 574, 576; 91 Pac. 495, this Court emphasized the rule as follows:

> "Even had defendant intended to waive his rights in this respect, it must be remembered that this is a matter in which the pub-

> lic has an interest which cannot be left entirely to the wishes of the person on trial. Otherwise a defendant might enter into a binding contract with the state, through the district attorney, to go to the penitentiary for a certain number of years, in satisfaction of an offense. But it is too well settled to need citation of authorities that the public has such an interest in procuring a trial of the citizens of the state according to law as to preclude such proceedings."

And then the Court cites with approval the following extract from *Hill v. People,* 16 Mich. 351:

> "Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow. But the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act of neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger *in limine,* and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases emphatically that consent should not be allowed to give jurisdiction."

And Mr. Justice Harlan, in *Crane v. United States,* 162 U. S. 645; 16 S. C. R. 952, uses this language:

> "The present defendant may be guilty and may deserve the full sentence imposed upon him by the trial court; but it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that he had a valid trial."

That the defendant does not waive by not objecting thereto the necessity of showing facts constituting a crime, is determined by the statute. He does not waive that necessity even by pleading guilty to an indictment failing to state facts sufficient to constitute the crime. Section 1560, O. L. allows a motion in arrest of judgment on a plea or verdict of guilty, and such motion may be founded upon the objection that the indictment does not state facts sufficient to constitute a crime.

There is another reason why the Court cannot ignore the error here complained of. The requirement of an exception is a judicial and not a statutory rule. A rule or ruling of the Court in conflict with the statute is void. The statute of this State forbids a trial court to sentence an accused to death upon his consent only. Section 1907, O. L., provides:

> "If, upon an indictment for murder, the

> defendant be convicted upon his own confession in open court, the court shall hear the proof and determine upon the degree of murder, and give judgment accordingly."

A confession in open court, which is the same as a plea of guilty, is a consent to the truth of the charge of murder in any degree. Yet upon such a solemn consent in open court, the Court cannot sentence the defendant to murder in the first degree, but must hear the proof and determine the degree of murder. Now, the Court has decided in effect that, not taking an exception to the instruction, he has consented thereto, and, as we have shown above, the instruction permits the jury to find the defendant guilty of murder in the first degree upon facts that do not constitute that crime.

Now, it is everywhere held that a rule of the Court in conflict with a law is void.

7 R. C. L. p. 1024.
State v. Posey, 17 La. Ann. 252; 87 A. D. 525.
Van Ingen v. Berger, 82 O. St. 255.
Suckley's Admr. v. Rockford, 12 Grat. (Va.) 60.
Goodwin v. Bickford, 20 Okla. 91; 129 A. S. R. 729.
Note: 41 A. S. R. 642.
People v. Met. Surety Co., 164 Cal. 174; 128 Pac. 324.
Ann. Cas. 1914-B, 1181 and Note.
Mills v. United States Bank, 11 Wheat.

431, 438 (6 L. Ed. 512).
Doe v. Winn, 5 Pet. 233, 242.
Schitzner v. Stein, 96 Or. 343.
Pittock's Will, 102 Or. 159.

As stated in Doe Re Patterson, 5 Pet. 243:

> "However convenient the rule might be to regulate the general practice of the courts, we think that it could not control the rights of the parties in matters of evidence admissible by the general rules of law."

That the presumption of consent is the basis of the judicial rule requiring an exception is demonstrated in the case of *State v. Laundy*, 103 Or. 443. This Court, speaking through Judge Harris, has given the clearest exposition of the function of an exception and of the rationale of the rule that can be found anywhere. We quote:

> "Before noticing the record, let us first consider the subject of exceptions. What is an exception? What is its office and function? Is it nothing more than an arbitrarily prescribed ceremonial amounting to a meaningless mummery; or, is it, like most rules of procedure, a rule based, not upon purely arbitrary grounds, but upon substantial reasons and hence designed to accomplish in a logical and understandable way a definite purpose? In the language of the Code, 'an exception is an objection taken at the trial to a decision upon matter of law': Sec. 169, O. L. An exception is a pro-

test against a ruling of the court. It is notice *to the court and opposing counsel that* the objector does not acquiesce in the ruling. When, for example, in the course of a trial an objection is made to a question asked a witness, and the court rules on the objection, the objector may or he may not be satisfied with the ruling. If the objector is satisfied with the ruling, the court and the opposing attorney are entitled to know it; and so, too, they are entitled to know it if the objector is not satisfied. If the objector is silent after the court announces its ruling, the presumption is that the objector, after hearing the ruling and the reasons for it, acknowledges the correctness of the ruling and *acquiesces in it;* and, consequently, *in order to prevent the presumption of acquiescence the objector must ordinarily express his nonacquiescence.*"

Citing:

Sec. 169, O. L.
Hayes v. Clifford, 42 Or. 568.
Fornof v. Wilkinsburg, 238 Pa. St. 614.
3 C. J. 894.
8 Ency. Pl. & Pr. 157.
2 R. C. L. 92.

The Court said further:

"In addition to serving as notice of nonacquiescence, an exception, in many jurisdictions, performs another function, although it is possible that this other function is not now so important in this jurisdiction as it was before the amendment of certain sections of the Code regulating appeals."

Then the Court cites Sec. 171, O. L., which provides that "the bill of exceptions may consist of a transcript of the whole testimony and all of the proceedings had at the trial."

The other function performed by the exception, referred to, is that the ruling may be a part of the record. But what transpired at the trial may be made a part of the record although it is matter not excepted to. The instructions in this case are made a part of the record. Now, since the ruling here, which is the instructions, is of such nature that the defendants cannot be held to acquiesce in it, because the State has an interest in their life and liberty, and because of Section 1907, supra, then an exception, if taken, would perform no function. It would, in the language of the Court in the Laundy case, be only "an arbitrarily prescribed ceremonial amounting to a meaningless mummery."

The instructions being a part of the record, Section 172, O. L., applies, which is:

> "No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the Court."

And in the Laundy case the Court holds as follows, quoting Sec. 1625, O. L.:

> "The Court can review only 'questions of law appearing upon the transcript'. This is

> the only statutory declaration upon the subject; it is the only prohibition imposed by the statute; and if there be any additional prohibitions or restrictions they are only such as are prescribed by judicial decisions. In this jurisdiction, as in most jurisdictions, the general rule established by Court decisions is that only such questions of law as are presented upon an objection, an adverse ruling, and an exception will be reviewed upon an appeal; but this rule, like many rules, has its exceptions. One exception to this general rule, expressly recognized by the Code, is found where the question of law is one that is involved in a ruling which properly appears in the judgment roll even though there be no bill of exceptions."

The instructions here complained of are a part of the transcript in this Court. They are certified by the judge below to have been given at the end of the trial. They are filed in the lower Court, and upon a suggestion of a diminution of the record, and an order of the Court, the clerk has certified the instructions here. The judge of the lower Court certified that these instructions were substantially those given at the end of the trial. Section 172, Oregon Laws, provides that they shall be taken as a part of the record. He interpolated into his certificate that he gave some instructions during the course of the trial. But the instructions given at the end of the trial became the law of the case to the jury. It is the last word of the Court to

the jury about the law. In Section 132, Subd. 6, 1 O. L., it is provided that after the argument "the Court may then charge the jury." And in Section 139, 1 O. L., it is provided that "in charging the jury the Court shall state to them all matters of law which it thinks necessary for their information in giving their verdict." Now, the instructions given from time to time upon matters of evidence arising during the trial are not the charge mentioned in the statute. That charge consists of all the law of the case which the Court deems necessary to inform them. The Court therefore must look to this charge as finally given to determine whether error has been committed. It cannot be presumed that the charge required by the statute to be given at the end of the trial can be scattered throughout the trial. No presumption can possibly arise that any previous direction to the jury in the course of the trial has in any wise qualified or improved or cured the instructions given in the charge. If there is a single case anywhere that decides that the final charge does not contain all the instructions of the Court, we have not found it. The interpolation, so far as I know, is the first of the kind on record. This is important because the Court has indulged the presumption that other instructions were given in respect of some other errors relied on. In any event, what those instructions during the trial

were, does not appear from the Bill of Exceptions. If there were any pertinent to the error, it was incumbent on the district attorney to see to it that they were incorporated in the Bill of Exceptions. See authorities infra.

It appears that the instructions here given are a literal transcript of the instructions given in the case of *State v. Brown,* 7 Or. 186. But in that case the robbery was admitted, as the Court said, and the question before the Court was not as to the correct definition of the robbery, but whether or not the killing was done after the robbery was completed. Neither counsel nor Court considered the question of the definition. It is not a precedent to support the instruction here, and if it were, it ought to be overruled, for it is contrary to the well settled rule.

Section 554, O. L., provides that the appellant "shall file with the clerk of the Appellate Court a transcript . . . of so much of the record as may be necessary to intelligibly present the question to be decided by the appellate tribunal." The appellants here have caused to be filed a certified copy of all the charge delivered to the jury at the end of the trial, and on file in the lower Court. They have done everything the law requires them to do to invoke a decision upon the question here presented.

We present to the Court some of the authorities to the effect that the appellate Court will,

without objection or exception, reverse a case for the total lack of evidence of some element of the crime charged. Now, what is the difference between such failure of proof and an instruction to the jury that the necessary element need not be proved? In either case the verdict is founded upon facts that do not constitute the crime, for the Court must presume that the jury followed these instructions, and that the vice inheres in the verdict.

Moore v. United States, 224 Fed. (C.C.A.) 95, 97.

Wyborg v. United States, 163 U. S. 632, 658 (16 S. C. Rep. 1197; 41 L. Ed. 289).

Sykes v. United States, 204 Fed. 909, 123 C. C. A. 205, 210.

~~*Isbell v. United States,* 227 U. S. 788.~~

~~*Means*~~ Reems *v. United States,* 217 U. S. 349, 362 (30 S. C. R. 544; 54 L. R. A. 793).

Of course, our contention is that the exception was not necessary to raise the question, and that counsel for appellants was not in any wise derelict in failing to take an exception. But sometimes it is said that in justice to the Court below, as if the Court were on trial, the attendtion of the Court ought to be called to a fault in the instructions. If that be so, yet it is a fault that does not carry with it the serious consequences in this case. A failure to take an exception to an instruction is not murder in the

first degree. The appellants should not be

> "Without reprieve, adjudged to death
> For want of well pronouncing Shiboleth."
>
> —*Milton.*

This Court, it is justly said, has only appellate jurisdiction. But its appellate jurisdiction is plenary. It is conferred by the Constitution, and it is to revise the final orders of the Circuit Courts. The Court can no more restrict its appellate jurisdiction by its rulings than it can exceed it. Therefore, when appellants present to this Court a question plainly appearing in the record, which they have not waived, because they cannot waive, and which, if well taken, must result in a reversal of the judgment, the Court is without any power to refuse to hear it. The right of appeal is given them by law, and the Court cannot take it away from them. The appeal is a part of the due process of law which the Constitution and the law, in pursuance thereof, has guaranteed to them. It is their lawful remedy. The Court's ruling that it will not decide this question is therefore in contravention of the Constitution of the State, which provides that every man shall have remedy by due process of law for injury done him in person, property or reputation, and of the Fourteenth Amendment to the Constitution of the United States, which prohibits any State from depriving any person of his life or liberty without due process of law,

or to deny him the equal protection of the law.

In any criminal trial, and particularly where it is a question of life and death, the trial Court and the accused are not adversaries. The Court is no man's adversary. Its first care is to see that the accused has a fair trial, and that means a legal trial. Its duty in that respect is not qualified in a matter involving the substance of the crime by any omission of the defendant. The responsibility of the Court cannot be shifted to the defendant's shoulders. If the inadvertence was the defendant's, it was the Court's, in the first place. The appellants should not suffer because they were not alert to instruct the Court in the discharge of its paramount and undelegable duty.

There was fatal error. It is only the majesty of the law that can pronounce the legal doom of death. And where the law has not pronounced it, it cannot be decreed by the breath of any man.

Error in Admitting the Statements of the Appellants Taken at the Penitentiary

The following from the Bill of Exceptions states in full what occurred when the evidence was offered and admitted:

> "Blanche F. Barrett, being called as a witness on behalf of the State of Oregon, and duly sworn, was interrogated by John H. Carson, District Attorney, and in said interrogation, gave the following answers

to the following questions, to-wit:

Q. You are the duly appointed, qualified and acting court reporter of this district?

A. Yes, sir.

Q. At our request, on or about the 25th day of August, 1925, did you attend at the Oregon State penitentiary for the purpose of taking stenographically the statements of these defendants, Ellsworth Kelly and James Willos, together with a statement of the defendant Tom Murray?

A. Yes.

Q. Do you recall at that time and place, being the parole office of the Oregon State penitentiary, Salem, Oregon, having seen the defendant Ellsworth Kelley?

A. Yes, sir.

Q. Did you hear a conversation between Ellsworth Kelley and myself and others?

A. I did.

Q. Did you report stenographically these conversations?

A. I did.

Q. State whether or not the transcript you made is a correct transcript of your notes taken at the time of the conversation.

A. It is.

"Whereupon the defendants, through their counsel, Will R. King, objected as incompetent, and for the further reason it is not disclosed the statement was made with-

out duress, or without offer of reward, or that they were made voluntarily, and that if the witness has any knowledge independent of her notes she must state orally what was said.

Q. (Mr. Carson) Do you recall the conversation had between ourselves and Ellsworth Kelley?

A. Not independent of my notes, Mr. Carson.

Q. By referring to your notes could you correctly restate the conversation as it was had?

A. I could.

Q. Then will you please get your notes, with the consent of the Court?

"Whereupon, the witness, returning to the Court room with the shorthand notes above referred to, the jury was dismissed from the Court room and the witness read from her shorthand notes the above referred to statement of the defendant Kelley, and also the statement of the defendant Willos, after being interrogated by the district attorney along the same line as to defendant Willos as previously set forth as to defendant Kelley, which statements are as follows:"

(Here follows the statement by questions and answers of the defendant Kelley.)

We call particular attention to the last foregoing statement of the Bill of Exceptions, be-

cause the Court has a misapprehension about that. Assignment 13 recites:

> "It is further assigned as error that James Willos was called as a witness without first having been informed that it was unnecessary for him to give testimony regarding himself, all of which was in violation of Article XIV amendment to the Constitution, etc."

This assignment is clearly intended to raise the question of the introduction of the statement of James Willos taken at the penitentiary, and was not intended to assign as error that he was not informed of his right not to give testimony when he was called as a witness by his counsel. That would be an absurd construction. Surely counsel cannot be supposed to have called his own client as a witness, and then object to a failure of the district attorney to tell him that he did not have to give testimony. So the statement in the bill of exceptions above recited, that the same objections were made to the statement of Willos as had been previously made to the statement of Kelley, shows clearly that Assignment 13 was intended to raise the same question.

Then the Bill of Exceptions, page 39, continues:

> "Whereupon, at the close of the above testimony, Will R. King, counsel for defendants, further objected on the ground that the parties questioning defendants were

State's attorneys, and did not inform or apprise defendants, or either of them, of that fact, and defendants were not apprised of their constitutional rights of counsel, which further objection was overruled by the Court, who said: 'It is very clear to my mind that this testimony is only applicable to the defendant whose statement was being made. In other words, the alleged statement made by the defendant Kelley would not be binding against the defendant Willos, and the alleged statement made by Willos would not be binding against Kelley, and only so far as it tends to show the connection of the defendant speaking to the alleged offense would it be heard, and I will so instruct the jury at this time.' Which instruction was duly given.

"The above ruling the Court in allowing the statements above set forth to be repeated by said witness in the presence of the jury was excepted to by counsel for defendants, Will R. King, which exception was allowed by the Court, and the statements were thereupon repeated by the witness, this time in the presence of the jury."

Before evidence of confessions or admissions involving guilt, made to officers, can be admitted, it is incumbent upon the State in the first instance to prove to the satisfaction of the trial Court that the statements were voluntarily made.

State v. Sharos, 56 Or. 119, 120.
State v. Humphreys, 63 Or. 540, 553.

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State v. Garrison, 59 Or. 440.
State v. Rogoway, 45 Or. 601,. 606.
State v. Blodgett, 50 Or. 329.
State v. Morris, 83 Or. 429.
State v. Howard, 102 Or. 431.

In respect to this ruling upon this record, this Court said:

> "A careful reading of the subject matter involved discloses no confession of guilt on the part of the defendants. On the contrary, they denied any participation in the killing of Sweeney or any attempt to kill him."

Then the Court said:

> "Granting for the moment that the statements reported by the stenographer were indeed confessions or distinct admissions of guilt, the admissibility of any inculpatory statements of defendants is a question of law in the first instance for the Court, and in the absence of any showing on that subject in the bill, we must presume that the Court did its duty and required such a showing to be made. There is no challenge in the bill to the sufficiency of any showing."

The Court is wrong in both of these rulings. Of these questions in their order.

It seems to be the opinion of the Court, because, as the Court finds from the reading, the appellants denied any participation in the killing of Sweeney, or any attempt to kill him, that that fact alone reduces the statements from confessions to admissions. The contrary has been

established by this Court. *State v. Porter*, 32 Or. 135. The question is not whether the appellants made exculpatory statements accompanying their statements, but whether or not the statements that they admitted to be true involved the commission of some degree of the crime charged. Before examining these statements in that respect, we will examine the Porter case. The gist of the opinion is stated in the first syllabus, and is as follows:

> "Statements or declarations of the accused, voluntarily made, of such facts as necessarily involve the commission of a crime, or in themselves constitute a crime, are admissions of guilt, and may be properly denominated confessions; nor will they be reduced to the grade of admissions only by exculpatory statements made in the same connection. *State v. Heidenreich*, 29 Or. 381, distinguished."

The exact distinction between confessions and admissions was the exact point in that case. The Court below, in instructing the jury, had referred to certain statements of the defendant in evidence as confessions and admissions. It was contended by the defendant that this was error, because it was inapplicable and misleading to call the statements confessions. The case of *State v. Heidenreich*, 29 Or. 381, had held that an instruction was error that described statements of the defendant as confessions when they

were only admissions. It became necessary, therefore, for the Court in the Porter case to determine whether or not the statements involved in that case were confessions or only admissions. Many authorities are cited. 1 Greenleaf on Evidence, Sec. 170, describes confessions as admissions from which guilt might be implied. Wharton on Criminal Evidence, Sec. 626, 628, is quoted at length, in which the distinction is made between confessions and admissions. This language is used: "An admission of an incidental fact is of no weight unless it affords a basis for an induction of guilt."

Then this Court says, in the Porter case:

> "From these authorities we take it that the admission of a fact, or a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. Of the latter character were the admissions in the Heidenreich case."

And the admissions in the latter case were held to be entirely consistent with the innocence of the defendant. The Court continued:

> "His guilt was not deducible from his admissions without the presence of other facts and circumstances necessary to be

proven in connection with his possession to establish the crime charged."

The Court then, citing the cases where error was committed by calling admissions confessions, stated that in each of those cases the facts admitted may have been taken as entirely true and still be consistent with defendant's innocence. It is said that they were "fragmentary, and, unless complemented by other proofs necessary to the establishment of the offense, guilt could not be predicated upon the admissions."

On page 149 the Court resumes:

"The reasoning of counsel seems to be that, because of the exculpatory matter, there can be no concession of guilt, and hence that the statements or admissions cannot amount to a confession. But the concessions of facts which import guilt come first. These are always inculpatory, and it is only when the exculpatory matter is adduced that he is relieved from the onus of guilt which the facts imply. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and these import guilt, or, as put by Mr. Wharton, 'I am guilty of this;' and this imports the admission of all the acts constituting guilt."

And further, on page 150:

"So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as in-

> volve necessarily the commission of a crime, or in themselves constitute a crime, then the facts admitted import guilt, and such admissions may properly be denominated confessions. Exculpatory statements, made in the same connection, if believed, may excuse or justify, but do not reduce the declaration from a confession to an admission only."

It is said also, on page 149:

> "The instructions, however, were given with reference to admissions before the trial, and it is in that light that we design to consider them, and it is sufficient that the admissions involve any degree of the crime charged. . . . and a confession of either degree, with proof of the *corpus delicti,* would be sufficient upon which to base a verdict of the crime involved."

That case was cited in *State v. Caseday,* 58 Or. 450. The opinion was by Mr. Justice Burnett. The defendant complained of the following instruction:

> "The testimony of some witnesses has been offered by the State to show certain oral statements made by the defendant now on trial, after the death of Oliver Snyder. In criminal law a statement voluntarily made by a person of a fact only, which is as consistent with his innocence as with his guilt, and is made exculpatory, or in explanation of any suspicious or incriminating circumstances, is an admission; but when the statement carries with it a *suggestion of guilt,* either as to the character of his intent, or

> the quality of his act, and the statement is made inculpatory, such statement is in the nature of a confession."

The Court in that case approved that instruction, citing the Heidenreich and Porter cases. The instruction is in accord with the Porter case in that when the statement carries with it a suggestion of guilt, it is a confession.

Now, in the light of these cases, we will examine the statements, and certain instructions of the Court.

Kelley said that he and Willos cut the hole in the roof through which the escape was made. He was asked this question:

> Q. When did you tell Jones and Murray you had cut the hole?
>
> A. Well, they already knew, they knew we was going to cut it.
>
> Q. How long had you been discussing the break?
>
> A. Well, we had been discussing part of it—for a considerable time. We didn't figure on the shooting end of it.
>
> Q. Well, except for the shooting, did you figure it out just as you did it?
>
> A. Except for the shooting. We figured we was going out the front gate, that was our intention, to go out the front gate.

It appears all through these statements of both appellants that all four men were

engaged in an attempt to escape from the penitentiary where they were convicts. On page 24 Kelley was asked:

Q. How long had you figured on making the break through the roof?

A. Well, we discussed it off and on several months but we hadn't decided on the exact method of doing it.

Q. Had you decided—how long prior to the time you got the hole made, on that particular day?

A. Yes, whenever—we had agreed to do it on commissary day, when the fellows were taking groceries up and back and forth.

Willos' statement follows in this respect:

Q. Willos, will you give us your version of this escape that you were in with Murray and Jones and Kelley?

A. All right; whereabouts do you want me to start in.

Q. From the time you planned it.

A. From the time we planned it?

Q. Yes.

A. The first time we ever got to talking about it, we were sitting behind the woodpile one day, and we got to talking about liberty, and we would all like to get out, you know, and Murray he made the suggestion about going out through the roof, and through the front gate, and it sounded all right to me, and they never at that time said anything about killing anybody, nothing like that, but I'd been here

for a long time you know, seven years, and I had no understanding with them they would do anything like that, anything like that was going to take place, I thought it was all right, and so I just went with them, and never thought no more about it.

Q. Who was it cut the hole?

A. Why, Kelley and I cut the hole.

Q. Was that the understanding?

A. Well, they thought it wouldn't be noticeable.

Q. They figured, Jones and Murray figured you and Kelley wouldn't be noticed as much as Jones and Murray, your absence?

A. Yes, so we cut it.

Q. When did you cut it?

A. Some time in the afternoon.

Q. On the day of the escape?

A. Yes.

So the statements of both appellants admit the existence between all four of a conspiracy to escape from the penitentiary. An attempt to escape from the penitentiary is a felony. Sec. 2035-1 O. L. Now, it was necessary, in order to convict these defendants of murder in either degree, to prove a conspiracy to escape from the penitentiary, if one of the other conspirators and not themselves killed Sweeney, and the Court so instructed the jury. On page 7 of the

instructions the Court instructed the jury that it was necessary to show "that the defendants Ellsworth Kelley and James Willos committed the crime by acting in pursuance of a conspiracy in concert with, or by aiding, abetting and assisting the person who shot and killed John Sweeney, if said John Sweeney was shot and killed."

And on page 13 of the instructions, the Court instructed:

> "I instruct you that a conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself unlawful or criminal, by criminal or unlawful means. When individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is in legal contemplation the act of all. And this mutual, coequal responsibility of each conspirator for the acts of his associates done pursuant to and in furtherance of the common design extends to such results as are the natural or probable consequences of such acts, even though such consequences were not specifically intended as part of the original plan."

The Court further instructed the jury:

> "The State contends that the defendants on trial entered into a conspiracy with defendant Tom Murray, and one Bert Oregon Jones to escape and aid each other in escap-

> ing from the Oregon State Penitentiary, and pursuant to and in furtherance of such alleged conspiracy the crime alleged in the indictment was committed. This is one of the issues in this case."

The Court further instructed the jury, page 14:

> "All who take part in a conspiracy while it is being formed and all who with knowledge of the facts concur in the plans originally formed and aid in executing them are fellow conspirators. They commit the offense when they become parties to the transaction or further the original plan with knowledge of the conspiracy."

Then on page 15 the Court at length instructed the jury that if any one of the conspirators shot and killed Sweeney, "then the defendants on trial, unless they were legally insane at the time, are guilty of murder in the first degree, although neither of the defendants on trial fired the fatal shot which caused the death of John Sweeney."

So that the admissions of both appellants that they were in a conspiracy to escape from the penitentiary involves the guilt not only of that crime, but the crime of murder in the first or second degree, committed in attempting to escape. Under the definition of the Porter case, this was an admission of an essential fact to be proved by the State under the indictment, even

though the defendants did not themselves kill Sweeney.

But the statements of the appellant went further than an admission merely that they were engaged in an attempt to escape. They both stated facts from which the jury could find that it was a part of the conspiracy to use guns in attempting to escape. Kelley's statement, page 18:

> "Q. Well, you decided in discussing, planning it, to make for the arsenal, didn't you?
>
> A. Well, someone discussed that. They thought that would just take care of itself; if they had to take a chance to take a couple of men in the office and make them go ahead out the front gate; otherwise try to get in the arsenal. None of us knew for sure whether there were any loaded guns in the arsenal; it was kind of speculation on our part.
>
> Q. But you all must have figured there was at least one gun or more in the arsenal?
>
> A. Well, the only thing we might have figured on was a pistol being on the desk, which wasn't there, and that is the only thing we actually figured on, was the pistol, which wasn't there.

On page 24, Kelley's testimony:

> Q. You thought there was a gun in the turnkey's office on the desk?

A. They thought there was one in the turnkey's office on the desk, yes.

Q. Is that why Murray and Jones went immediately to the turnkey's office when they got down?

A. That is why Jones went to the desk. He went to the desk, but they were figuring on making the turnkey go ahead and go out the front gate. They thought it was a long-shot, they didn't know whether it would work or not, but that is the way we had it *figured in the first place.*

Q. You must have figured it was necessary to get a gun to do that?

A. That was all just kind of speculation about the gun proposition, Jones he wanted to get the guns, and I had been arguing against it myself from the start. I knew we couldn't get away with a thing like that.

Q. They finally then overruled your objection?

A. Yes.

Q. And decided to get the guns anyway?

A. Yes, sir.

Willos did not make any specific admission that he intended in the original plan to get guns or to do any shooting, but when they were down in the prison yard he stated that the shooting commenced, and that a gun was tossed to him by Murray, and that he picked the gun up and

shot three times in the direction of the garage, but that he did not see anybody.

From that evidence the jury could infer a previous intention, as a part of the conspiracy, to use guns.

Besides all that, the Court correctly instructed the jury, as stated above, that a conspirator is responsible for the natural or probable consequences of the acts of his co-conspirators, even though such consequences were not specifically intended as part of the original plan.

In addition to that, both of the appellants stated to seeing Holman and Sweeney shot by their co-conspirators. If they were responsible, being co-conspirators, for that act, the statement is a confession of a fact criminal in itself.

In addition to all that, both the appellants stated that they took the guns and pistols with them when they escaped from the penitentiary, and afterwards threw them away or hid them under a log, all except one pistol.

There is no dispute that Sweeney was killed by one of the men, a member of the admitted conspiracy. That was proved by the State, and was corroboration, with the confessions, sufficient to submit to the jury. So with the confessions and the required corroboration the Court would have been justified in submitting upon that evidence alone the question to the jury. To

say that these statements, as the Court does, were admissions and not confessions, is contrary to the purport of the admissions, and contrary to the ruling in the Porter case.

The Court cannot presume the existence of any evidence by the State that these admissions were voluntarily made. The Bill of Exceptions, in its recital of what occurred at the time of the offer and admission of the testimony, contains no evidence whatever upon the subject of the voluntary or involuntary nature of the statements. The Bill of Exceptions, therefore, is silent on that question. If there was any evidence offered to the Court by the State at the time, or at any time, that these confessions were voluntarily made, it was the duty of the District Attorney to see to it that such evidence was incorporated in the Bill of Exceptions. That is the unqualified and constant holding of this Court.

In *Dubois v. Perkins*, 21 Or. 189, it was contended that certain evidence was rendered competent by other evidence given upon the trial, but which was not in the Bill of Exceptions.

> "It was accordingly argued," says the opinion, "that for the purpose of sustaining the judgment, we must presume that such evidence was actually given upon the trial. *But this is not the correct rule.* While it is true that error will never be presumed, the converse of the proposition is equally true.

> When error does affirmatively appear, it will not be presumed that it was rendered harmless or removed. If it were so, the *respondent must see to it* that the matter which renders it harmless or removes it is made to affirmatively appear in the bill of exceptions."

In *Nickum v. Gaston,* 24 Or. 380, 392, the Court held a certain instruction to be error. It was contended by the respondent that as all the instructions were not in the record, it would be presumed that the Court elsewhere properly instructed the jury. The Court held against the contention, and in support of its ruling quoted the language above quoted from Dubois v. Perkins, to the effect that respondent must see to it that the matter which renders it harmless or removes it, is made to appear affirmatively *in the bill of exceptions."*

Again, in *Carney v. Duniway,* 35 Or. 131, 136, the Court was asked to presume that "the error in overruling a motion for a non-suit was cured or rendered harmless by some subsequent proceedings on the trial in the absence of a showing to that effect." The Court overruled the contention, and in support of its ruling quoted the language in Dubois v. Perkins, that the respondent must see to it that the matter which renders it harmless is made to affirmatively appear in the bill of exceptions.

Dubois v. Perkins was again cited with ap-

proval in *Cleveland Oil Co. v. Insurance Society,* 34 Or. 228, 235. The Court below had overruled a motion for non-suit, which was held error. It was contended that the evidence of defendant after the motion was overruled might have supplied the deficiency in plaintiff's evidence. The Court overruled the contention on the authority of *Dubois v. Perkins,* and remarked:

> "It was the duty of plaintiff (respondent) to include in the bill of exceptions those portions of the evidence given by defendant, if any, tending to supply such deficiency."

Dubois v. Perkins has been cited with approval and without qualification of its language and holding in the following additional cases:

Aldrich v. Col. R. Co., 39 Or. 263, 279.
Carter v. Wakeman, 45 Or. 427, 430.
Durkee v. Carr, 38 Or. 189, 196.
State v. Osborne, 54 Or. 289, 291.
Provo v. Spokane P. & S. R. Co., 87 Or. 467, 475.

The proceedings at the penitentiary were most extraordinary. It is not a case where a defendant under arrest makes statements to an officer, either voluntarily or involuntarily. The District Attorney, as the bill of exceptions shows, went to the penitentiary not only to interview the appellants but to get the statements reported by the official reporter, and to offer them as evidence at the trial. It was an inqui-

sition, by searching questions, to get from appellants all the evidence he could to be used against them.

1. Admitting the statements deprived the appellants of aid of counsel. Admit that ordinarily the right to such aid is only when the case is on trial. But this inquisition was conducted by the State in every respect as it would have been if on a trial, and the appellants as witnesses, except that they had no counsel and no court to protect them. The proceeding deprived them of the aid of counsel at the trial. The very things were already done which required his aid in the doing. He had no opportunity either to advise or make legal objections to the questions at the trial.

2. The proceeding compelled the appellants to testify against themselves. The defendant need not be a witness in his own behalf, and if he is not, it cannot be used against him. Yet the effect of taking their evidence out of court, and having it reported, and then using it against them in court, cannot be distinguished in matter of substance from calling him as a witness against his will at the trial.

3. The appellants were not informed of their right to make or not make a statement. The Court answers this objection by saying that the statute on the subject of proceedings before a magistrate "does not refer to any case such as

that disclosed in the evidence where the defendants are said to have conversation with the District Attorney concerning their presence and actions at the time Sweeney was killed." The statute does not apply to the proceeding, indeed, and for the simple reason that it does not contemplate that such proceedings can be had at all, *except before a magistrate.* Can we attribute to the legislature an intention to guard so carefully the rights of an accused before a magistrate, and then authorize these rights to be violated by the simple device of dispensing with the magistrate? The legal effect of the statute in question in prescribing the methods of the examination before a magistrate, is to negative such an examination by any other officer, or by any other methods. Therefore this proceeding, whether the statements were confessions or admissions, or voluntarily or involuntarily made, is not authorized by any law, and is wholly as void as any other extra-judicial proceeding. It is exactly such proceedings in the progress of tyranny that induced the Constitutional provisions that in effect provide there can be no trial, or any part of a trial, in a criminal case except in open court and before a jury.

We have referred to this as a capital case, but only for the purpose of invoking the law of strictness in favor of life applied everywhere in capital cases. Further than that we have made

no appeal to the sensibilities of the Court. The argument is addressed to the unimpassioned function of the Court to hold the law. It is not a prayer for a grace which the Court has no power to grant. It *is* a demand for a right which the Court has no power to withhold.

The Jury's Latitude in Fixing Penalty

The instruction referred to in our 27th assignment of error, quoted on page 982, printed opinion (here being 17th assignment of error) should have been given to the jury. It is consistent with section 131 of Oregon Laws, with section 16, Art. I of the Constitution of this State and with a like provision of the Federal Constitution.

Section 1903 of Oregon Laws gives to the jury the right to reduce the penalty in first degree verdicts to life imprisonment. This law was adopted in 1920 and substantially follows the provisions of an act of Congress of 1897. This act has been construed in *Hopt v. Utah,* 104 U. S. 631, 633 (43 L. Ed. 873), in which it is made clear that rules of evidence are broadened, admitting evidence formerly held inadmissible in some instances, as an aid to the jury in determining the degree of crime, or penalty to be imposed, as the case may be. This decision is cited, followed and clarified by the same court in *Winston v. United States,* 172 U. S. 303, 314 (43 L.

Ed. 456). Also: *United States v. Williams,* 103 Fed. (C. C. A.) 946-7, and *State v. Peltier,* 21 N. D. 192 (129 N. W. 451), where authorities to same point are collated.

With all due deference to the views expressed in the opinion in the present case to the effect that our requested instruction ". . . is faulty in that it invites the jury into the realms of speculation and imagination entirely outside of the pale of the law and evidence"; and that "it is an invitation to violate their oaths to try the case according to the law and evidence . . .", it is respectfully requested that the statement quoted be compared with the language of Mr. Justice Gray in *Winston v. United States, supra,* at page 633, where it will be observed that our request is in full accord with the forcible decision there rendered on this particular feature, and, except for changes in the phraseology, the language used by us is substantially the same, and in no sense varies from the purport thereof.

The views expressed in the court's opinion on this feature are in accord with the instructions given by the *trial court* in the *Winston* case, *supra,* but that court was reversed and a new trial ordered because of such instructions. As our statute follows that of the District of Columbia, previously enacted, it should carry with

it the construction given in its interpretation by the highest court of the land.

Self Preservation

This brings us to the point considered by the court respecting the right of self defense. In the interest of clearness the words "self preservation" should probably be used, in lieu of the expression "self defense", as the latter, although included in the substituted expression, occasions some confusion in its application. The soundness of the rules given on page 981 of the opinion are not open to discussion, nor did we question the soundness thereof, either in our argument at the hearing or in our brief. The rules quoted in the opinion have reference to cases of the usual homicides in combats between men, not involved here. However, even they are general in their nature and subject to exceptions, as in instances narrated in the opinion of Mr. Justice Moore, speaking for the Court in 43 Or. 161; also *State v. Godager,* 56 Or. 201; *State v. Dorris,* 51 Or. 136.

The right of self defense, or *self preservation,* as stated by Mr. Blackstone, in his Commentaries, Vol. 4, star page 186, is as follows:

> "There is one species of homicide (*se defendo*) where the party slain is equally innocent as he who occasions death; and yet this homicide is also excusable from the

> great universal principle of *self preservation,* which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish."

Our points inthis regard were raised and presented in the refused instructions relative to cruel and unusual punishment, and of the right of self defense being never waived.

Before proceeding, attention is invited to the statement in the opinion of the Court (pp. 977-8) in reference to our fifteenth assignment of error, urged at the hearing, in which it is assumed, as a premise, that the proffered testimony of Murray was the only evidence offered of dangers confronting defendants in the prison, in which, for months prior to their escape, they believed their lives continuously to be in peril. Murray's attempted examination was only referred to in this connection as a means of identifying the error relied on involving the right to defend against what they believed would be a continuance of cruel and unusual treatment, and eventual death at the hands of prison officials and employes in charge. The testimony of both Kelley and Willos in this regard appears to have been overlooked.

The *testimony* of Kelley, bearing on this feature, introduced at the trial, begins on page 55 of the bill of exceptions, and, in narrative form, is as follows:

Page Sixty-four—

Kelley's Testimony, in Part, at the Trial

(Page 55, bill of exceptions.) In 1924 I was in what is known as the Bull Pen, the first time in the dungeon in the Bull Pen for about fifteen days. I don't recall the number of days in the dungeon, but after I became so faint, which was in May during hot weather, they transferred me to cell number 1. (p. 56.) I was also there (in the bull pen) prior to that time on one occasion 31 days. On March 3, 1923, I was confined in the bull pen 25 days for attempting to escape. My conveniences in the cell were limited to two blankets, the sleeping accommodations consisting of a bunk with steel slats 2 inches apart, which was worse than sleeping on the floor. (57) I was given but one small meal a day. Was not allowed to communicate with any of my friends or with any of the outside world. I was limited to the seeing and conversing with the one in charge, except to holler over to adjacent cells. We were allowed to clean our own buckets about every other day, (58) sometimes every three days. No one came to see me while there except the one bringing the meals.

I never knew what the charges against me were, except through what I could gather from other prisoners mostly, and (59) seldom given a chance to explain or reply to any charges against me.

Guards Fired Into the Cells

(P. 59). There were two different occasions during 1924, while I was confined in the bull pen that Mr. Hinton, "who was known to be somewhat a killer, at least a potential one, fired down into the bull pen cells" while I was there. At the time of this firing the doors were locked. I was in cell number 3 and his firing was in cells number 7 and 8. There was absolutely no provocation whatever for this firing into these cells.

"Q. During the time you were incarcerated there, or in prison, did any knowledge come to you of any one having been injured or killed by being fired into?"

"A. Yes, sir."

"Q. State what your information was regarding that, that is, what you heard?"

"A. Before I came in 1923, in January, there was a man by the name of James Ogle —(60) had had different altercations with John Davidson, who had the reputation of having killed several convicts during his life, all in just such helpless condition as he (Ogle) was at the time." . . . "The information I received in that respect was that he was killed by Davidson as he was taking his exercise, walking around the ring, known as the bull-ring, and as I heard it as he made his first revolution on the ring, Davidson shot him from behind, killing him, then taking his body over the wall on a rope. Some one had put a rock down

close to the ground where he was killed, as an excuse for Davidson shooting him." All this information came to me while in prison and while I was in the bull pen. The effect this information had upon me was that "I had to eventually believe it, as it was substantiated by quite a number of prisoners that were there during the time. (B. Ex. p. 61.)

This had a depressing effect upon my mind, keeping me in "constant" ar "extreme" fear, all of which was in mind at and near my attempted escape.

I also had other information regarding the danger I was in if I remained in prison, —"I heard by one of the prisoners that there were several of us marked to be shot at the slightest provocation, my name being among them." There were six names on the list, four of whom was Tom Murray, myself, Jones, Willos, and myself, am not sure as to the other two.

"Q. I will ask what effect if any did your incarcerations in the bull pen, under the conditions you have named, have upon your feeling of safety in general, or mental state of mind."

"A. It was very severe on any one's mentality to be in constant fear of their life at all times, such as existed in my mind during my confinement in the Oregon State Prison." "It was very depressing."

(P. 62.) At times while there in the bull pen I had fever and headaches, but medical attention was very hard to get while there,

although requested of the chapel in charge.

This was followed, beginning on page 63, bill of exceptions, by *testimony* of Willos, which in narrative form is as follows:

James Willos (pages 63 to 77, Bill Ex.):

After I was in prison about sixty days, I was in May 1924, without being given any information as to why I was placed there. I heard later that it was because I was suspicioned as having worked on a tunnel intended for escaping purposes; but I had nothing to do with it. I was merely working in that neighborhood. As to why I was there none of those in charge or employed in connection with the prison ever explained to me, nor did I ever have a chance to ask them why.

(P. 65.) I was first placed in the dungeon on the north wing,—the bull pen was full at the time, being two in each cell. Two of us were placed in the dungeon where we remained eleven days. "The first night all our clothes were taken away from us" leaving us with no clothes on, —without any clothes on at all. During the eleven days we had to eat "a couple of slices of bread a day," with all the water wanted, the water being in the cell. In addition to this experience I was confined in the bull pen (67) because as stated I was not wheeling concrete up a platform fast enough, but I was sick at the time, and

when explained they merely replied "that's the old story". I was there that time 17 days, occupying the dungeon. (p. 68) This was in December, with no heat in the cells, could only keep warm by walking up and down the cells, fed but once a day with a small bowl of beans and two slices of bread. "I was never exercised during that seventeen days." The cell was cleaned out, every two to four days. The size of the cell was about five feet wide, six feet long and about nine feet high. I was there another time eleven days. The cell had no sleeping accommodations, that is in the dungeon where I spent eleven days,—no blankets, had no way to keep warm other than natural condition of the cell. This confinement was in October. It was raining continually, and I suffered with cold. I was sick when placed there, had inflammatory rheumatism and spitting blood, but could get no medical attendance, although requested. Carey, the employee in charge, saw the blood on the floor, but merely laughed at me.

(70-71) I never had a bath nor a change of clothing while in the bull pen. The effects upon me mentally and physically were bad,—I could do no physical work for some weeks afterward. I heard all about the shooting in the bull pen and "while I was in the bull pen I had other prisoners tell me what had took place already." Told me all about the killing of Ogle, the taking

of his body over the wall. I was also informed that I was going to be taken to the bull pen and shot. I saw the indentations on the walls of the cells into where I was told that shots had been fired at times; also saw the bullet holes in the walls where was told were fired by 30-30 rifle. All were fired while cells locked and prisoners unarmed. The fear of being shot at, or shot, was on my mind day and night. I was informed I "was to get the same thing",—be shot at or shot. When a fellow learns anything like that of course he wants to get away; that was the effect it all had upon me. While there I could not communicate with friends in any way.

(73) I was told on several occasions by other prisoners that there was fifty dollars reward for the man who would get me, which I believed, all of which had a bearing on my attempt to escape on August 12th, so "I thought if I could get away I would try it, on account of what the prisoners told me I was going to get killed, and that I had no chance . . ." I felt that I was in danger if I remained and in danger if I attempted to escape.

The foregoing undisputed statements in the record clearly disclose a treatment not justified in this day and age. This system of treatment has long since been abandoned in most state and federal prisons. In fact, to justify it is but to

apologize for the inefficiency of prison management where in use.

The right of self defense, or *self preservation,* as here presented, is far from being of the type considered in the court's opinion. It may be termed *sui generis.* The question of provocation in mortal combat between individuals in the usual sense, is not involved. The question of "retreating to the wall," etc., applicable to the cases usually presented, where men are engaged in an assault and one is in immediate danger, where the killer must make every reasonable effort to avoid the assailant; where he must retreat to the wall, etc., is not this case. Here defendants were within the walls, with no chance to retreat or to escape the threatened dangers at the hands of those in whose charge they were placed under the law. The record discloses no justification for the cruelty and dangers imposed upon them. It may be said that such is presumed, but even if so, evidence is presented by the accused adequate for the consideration of the jury, whose duty it was to decide that question, and who were entitled to instructions concerning the law applicable thereto. These defendants, if the jury accepts their testimony as true, either in whole or in part, were stripped of clothing, thrown into a dungeon, left without bedding or clothing for twenty-four hours, with but two pieces of bread each, without knowledge

of charges against them, and then held there for days to follow. At other times placed in the bull pen on charges of which they had no knowledge, refused medical attention, as Willos states, while in the dungeon sick and spitting blood, and without bedding, only to be laughed at by his keeper. The conditions as described by them are such that it is surprising that fatal illness was not thus forced upon them.

That to break them down in health by this cruel treatment as narrated, constitutes great bodily harm, and eventually to take their lives, whether through or as a result of such treatment, or to be shot, as stated, by one of the guards, on slightest provocation as one of the *marked six* to be killed, as from their undisputed testimony appears was done in the case of Ogle, who it seems was shot without cause, and shot in the back at that (as Kelley testified from information received) while exercising in front of the bull pen cells, or whether shot in their locked cells in the bull pen, into which guards had been firing without cause, upon helpless convicts therein, it must be admitted would constitute a felony.

Every human being, under the law of the land, whether statutory or fundamental laws, is entitled to equal protection, which guaranteed right includes what Blackstone terms "the great principle of self preservation which

prompts a man to save his life pereferable to another." This is an inherent right, regardless of statutory law. But we have a statute, Section 1909 of Oregon Laws, which provides that any one may defend himself from unlawful acts, and that killing may be justifiable *"to prevent the commission of a felony upon such person . . . or persons there named".*

This section is also supplemented by Section 2382 (O. L.), which reads:

> "The person of a convict sentenced to imprisonment in the penitentiary is *under the protection of the law* and any injury to the person not authorized by law is punishable *in the same manner as if he were not convicted or sentenced."*

The enactment of these statutes for the protection of a prisoner was manifestly intended to place the prisoner under the same protection of the law as any other person; in fact these statutes are merely declaratory of the law as it was and had been, and evidently intended to remove any doubt on the subject and to correct the cruel and inhuman treatment previously in vogue in handling prisoners.

If the defendants, as reasonable men (as to which the jury are the judges) believed they were in danger of loss of their lives, or of great bodily harm which would eventually result in death, or that they were slated to be killed on

slightest provocation, as claimed to have been done in Ogle's case, it might, in the judgment of the jury, have been ample grounds for their escaping in order that the cruel and dangerous incarceration, with dangers feared, might be avoided. If found by the jury that such afforded inducements to escape and made by reason thereof, it became a question for the jury to determine whether the homicide was such as defendants acting as reasonable men might have believed essential to their self preservation and return a verdict accordingly, whether for acquittal or for a lesser degree of crime; and if a first degree verdict, whether the penalty should be death or life imprisonment.

The law applies to all men, whether free citizens or convicts. "The constitution (and laws under it) follows the flag" to the ends of the earth,—prison cells not excepted.

The sentence imposed upon convicts is limited to the law under which imprisoned. Additional punishments, except such as may be for mere infractions of the rules, to preserve discipline, so long as reasonable, are enforcible, but whether the cruelty and dangers here complained of were reasonable, was for the jury's determination, under proper instructions by the court as to the law. The law contemplates proper food, not starvation, reasonable warmth, not solitary confinement in open cells without refer-

ence to the condition of the weather, and in open and flagrant disregard of needed exercise or of sanitary conditions. Prisoners are entitled to live out their sentences, not to be ruined in health or to have their lives unnecessarily shortened by cruel treatment, nor to be shot as defendants were led to believe was the case with Ogle, the killing of whom, under the unquestioned showing made, was felonious.

Supplementing the provision in reference to justifiable homicide, the statute further provides (O. L. Sec. 2821) that while the Warden may prescribe rules for the government of the prison, enforce *appropriate* punishment, etc., ". . . neither the Warden nor any prison official or employee shall have the right to strike or inflict physical violence except in self defense, *or to inflict any cruel or unusual punishment.*" The rules that a warden may make, of course, are limited in their extent and application. *They must conform to the law* and not be in conflict or inconsistent with it. We have on previous pages made clear that even the Court of the State, whether trial or Supreme, cannot legally do so. In this position we are sustained by all authorities on the subject, many of which are cited above. If courts cannot enforce rules inconsistent with the laws of the land, certainly wardens of state prisons are limited in their authority in this respect.

In re Birdsong, 39 Fed. 599 (4 L. R. A. 628), a federal prisoner was confined in a county jail. The sheriff, in order to enforce one of his disciplinary rules, had him chained to the ceiling for two hours or more (testimony varying as to time) in such way that only the front of his feet were on the floor. The federal court held this to be cruel and unusual punishment and found the sheriff guilty and sentenced him to pay a fine for violation of the law of the land forbidding cruel and unusual treatment. See also *State v. Whitaker,* 48 La. 527 (35 L. R. A. 561), *Weems v. United States,* 217 U. S. 349 (54 L. Ed. 793), holding to same effect. It will be observed that each of the cases cited held there was a violation of the restriction in our fundamental laws respecting cruel and unusual punishment; and in none of the incidents upon which the holding was based were the cruelties greater, and in some not equal to that with which these defendants had to contend. That this Court has recognized the restriction see *State v. Ross,* 55 Or. 450, 473, and authorities there cited with approval. In *Weems v. United States,* the defendant, who was serving a fifteen year prison term, was released on *habeas corpus* proceedings because of being required by law (not by rule of the warden of the prison) to wear a chain connecting his wrist with his ankle. Others, in cases there cited, were released for less cruelties.

The "imminent danger" theory is clearly inapplicable here. What may be "imminent" in one case may not be imminent in the same sense in another. In this connection all the surrounding circumstances must be considered. As shown, defendants were starving and in filth, without change of clothing, their dungeons and cells unsanitary, without adequate warmth or bedding, by degrees dying in the bull pen along with convicts, in adjacent cells, undergoing similar experiences, and upon whom guards were practicing with their rifles, with the "convict" targets behind barred iron doors, with openings sufficient to enable bullets fired into them to make indentations on the back walls, and bullet holes through the front iron framework, at no time permitted to communicate with outside friends either by letter or in person, it should be clear they were without opportunity to "retreat to the wall", as the usual rule would have it. The walls in fact were all around them in close and enclosed proximity, at times two in a cell or dungeon, with limited room for one, with defendants at all times conscious of the impending danger of being shot, as was Ogle, on slightest provocation.

The treatment, as thus repeated from time to time, without knowledge of charges against them, with no opportunity of defense legally or in person, or otherwise, was not the result of the

acts of one man or few men only, but of the entire force, of all officials and employees, including those killed in the escape. Then under the evidence given by Willos and Kelley, the felony to be committed and crimes being committed from time to time upon them, under their treatment, was, in their belief, confronting them without their fault. It was under these conditions that they decided upon an attempt for their self preservation by escaping from within, at risk of their lives in the attempt in lieu of believed eventual death from within. It may be that reasonable men should not have taken their view of it and that some would not and do not, but whether they were acting as reasonable men was for the jury to determine. What may constitute a reasonable action, or an act of a reasonable man, varies with different persons and under different circumstances. As stated in *State v. Doris*, 51 Or. p. 159, "The jury were entitled to everything which could reasonably be presented and fairly affect the judgment of reasonable men in passing upon like questions, and in that respect *an ideal man cannot safely be taken as a model* by which every defendant charged with a crime must be judged. It must be made to depend, *not necessarily upon what the common experience of men should be* in such circumstances, *but upon what they are.*" Citing on this feature, Wharton, Criminal Law, (9 ed.) sections 490, 1192.

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Under the unquestioned showing disclosed by the testimony of each of the defendants, the court should have instructed the jury along the lines requested:

(1) That they might determine the guilt or the innocence of the accused under their stated facts as applied to the law of self preservation, or defense;

(2) That the jury might determine the degree of crime committed, if any.

(3) That the jury might determine whether justified in returning a verdict, "without capital punishment".

Defendants Indicted as Citizens But Tried as Convicts

Defendants were indicted as private citizens, without averment of any attempt to commit a felony while trying to escape prison. Nor was the charge for an assault upon a guard or guards, the penalty for which is provided in Sections 2047, or 2048, of Oregon Laws. The indictment contains no charges bringing defendants within the provisions of either of these sections, hence insufficient for their trial and conviction thereunder. See *State v. Smith,* 11 Or. 205.

The record discloses throughout, including the opinion of this Court, that defendants were each serving sentences under commitments for a term of years. This being true, the court was without jurisdiction to try them, unless the rec-

ord *affirmatively* (not by mere inference only) shows them to have been within the jurisdiction of the court during the entire trial. *State v. Gilbert,* 55 Or. 596; *State v. Cartwright,* 10 Or. 193; *Hopt v. Utah,* 110 U. S. 574; *Crain v. United States,* 162 U. S. 625, cited with approval in *State v. Walton,* 51 Or. 576; 50 Or. 152.

The tenor of all these cases is to the effect that all jurisdictional proceedings must *affirmatively* appear in the record. In the record here it is made to appear that each of the defendants are serving terms in the Oregon penitentiary under commitments adduced in evidence. Section 2821 of Oregon Laws places prisoners under the exclusive jurisdiction of the warden of the penitentiary. He can only be removed for trial by *habeas corpus* proceedings. *State v. Wilson,* 28 Conn. 126.

The presumption indulged in by the Court in the Connecticut case in recognizing the jurisdiction of the trial court, is overcome in this instance by *prima facie* disclosures in the record rebutting any presumption to the effect that defendants were in court under any due process. On this point it is at variance with the holding of this Court in *State v. Gilbert,* 55 Or. 596; *State v. Walton, supra,* and authorities therein cited, and unsupported in all jurisdictions, except states having statutes expressly or implied-

ly justifying it,—not appearing in our statute, or at common law.

The Court in the Connecticut case, however, makes clear that the removal from the jurisdiction of the warden is first essential to the jurisdiction of the trial court, and we find no cases holding to the contrary. In fact, after careful research, all cases coming under our observation were tried after first removing the accused (by *habeus corpus* proceedings) from the jurisdiction of the prisons in which they were serving unexpired terms.

Under Section 824, Oregon Laws, a prisoner serving sentence for conviction of a felony cannot be removed from prison to give testimony in any case. His testimony must be taken within the prison. The statute provides that a defendant may give testimony in his own behalf. This must, under our fundamental laws, be in the presence of the jury. How then can this be done while in the custody and jurisdiction of the warden? This should be sufficient to indicate that it was contemplated that the accused should be removed entirely from the jurisdiction of the warden pending trial. This could only be done through *habeas corpus* proceedings. The statute makes no provision for trial of convicts while serving in prison. The judgment recited the presence of the defendants in court, but it is disclosed by the commitments introduced by the

State in evidence, and in fact throughout the entire proceedings, including the opinion of the Court on appeal, that the defendants were serving unexpired terms for commission of felonies. The alleged confession, (improperly admitted in evidence, as shown in our discission, *supra*, and as held in the authorities last above cited), was obtained in prison and offered and admitted in evidence over our objections. These commitments disclose that each of defendants have several years of unexpired terms to serve.

Furthermore, Section 2380, Oregon Laws, merely *suspends* all civil rights of convicts who may be serving less than life terms, but with prisoners serving *life sentences* they become *civilly dead.* (2381, O. L.) The only provision of the statute which makes provision for trial of homicides committed by prisoners during such period are specified,—Sections 2047-8, Oregon Laws. There are no crimes at common law in this state. They are limited to those provided by statute. Sections 2047-8 make such provision, the specification of which excludes any other class of prosecutions for the killing of guards, insofar as may affect convicts while serving unexpired terms for the commission of a felony. The holding to the effect that the commitments of defendants were properly admitted in evidence indicates that the trial was con-

ducted, in part at least, under the sections of the statute last cited.

As stated by Mr. Justice Bean, in *State v. Howard,* 41 Or. 53:

> "It is a fundamental principle of common law that a defendant cannot be tried for one crime and convicted of another."

Here we have the anomalous situation of the accused, having been indicted as citizens under a general statute for murder, but tried as convicts under special statutory provisions enacted to meet the crime for which they were tried. The Court was without jurisdiction. On the other hand, if they come within the general statutes for murder, without regard to the specific statutes above mentioned, then in the absence of a statute to that effect a trial could not be legally had until after the expiration of the sentences as provided in their commitments.

This could be done only by acceptance of a pardon, or at least not until after executive clemency granted, which does not appear. It does *appear of record,* however, that they were still serving the time prescribed in the commitments by which they were placed within the jurisdiction of the warden of the penitentiary.

If held that defendants may, without statutory law to that effect, be tried as any other private citizen, under the *general law* and that this

was such trial, then defendants are entitled to the provisions of section 1576, regarding the sentences imposed. In some states where the law requires execution within a limited period, *and* otherwise makes provision for trials of convicts while other sentences are being served, it is held that the sentence may be imposed and carried into effect, regardless of whether serving sentence for conviction of other felonies. But our statute (Oregon Laws, Sec. 1602) fixes a minimum of thirty days, but not a maximum. This provision is consistent with Section 1576 regarding concurrent sentences, providing that the time of imprisonment shall follow expiration of former sentences, in which it is stated that "if the defendant be in imprisonment upon a *previous judgment*" . . "the imprisonment must commence at the expiration of the term limited by the previous judgment."

It is well settled law that one serving a term in prison may refuse a pardon and remain in his prison during his term if desired. *Carpenter v. Lord,* 88 Or. 137 (171 Pac. 577); *United States v. Wilson,* 7 Pet. 150. In referring to *United States v. Wilson, supra,* Mr. Justice Burnett observes, "The doctrine of this case has never been disturbed by any ruling to which our attention has been directed." In that case Mr. Justice Marshall, in referring to the effect of a pardon observes: ". . . if it be rejected, we have no

power to enforce it upon him." In the Carpenter case, Mr. Justice Burnett, continues:

> "Carpenter's legal condition has been fixed by the judgment . . . that adjudication is declared by Section 756 (O. L.). It restrains the State as well as Carpenter (the prisoner). He is entitled to enjoy its privileges and protection as well as to sustain its burdens and no power resides in the executive to deprive him thereof."

Again, that,

> "To deny the prisoner or one petitioning for him in *habeas corpus* the right to urge this would be to deny him the *equal protection of the law.*"

At the time Sweeney was killed, as charged, these defendants were each serving sentences for felonies, and as the commitments in the record show, had some years yet to serve. The sentence (assuming they were in jurisdiction of the Court and in charge of the sheriff) requires, that within twenty days they be placed in charge of the warden of the penitentiary there to remain until date of execution fixed to take place some weeks after the expiration of the said twenty days. There is accordingly a period of imprisonment effective, after the expiration of the twenty day period and during the several weeks to elapse from the twentieth day until date of execution. Section 1576 (O. L.) uses the word "imprisonment" shall commence, etc., it is true; but if defendants' confinement in the

penitentiary awaiting execution is not "imprisonment," what is it? If as held in *State v. Carpenter,* a defendant under the law is entitled to refuse a pardon, and to deprive him of this right is "to deny him the equal protection of the law," then upon what theory may a distinction be made between him and others in prison, who may be convicted of other types of felonies? Where does the statute provide the exception; and, if found, is it in harmony with the fundamental laws? The law gives all the right to have their imprisonment fixed by a sentence beginning after expiration of the time fixed by a previous sentence; the statute makes no exception. Is it not for the prisoner to say after having been given a fixed term, in reference to which, as held in the Carpenter case, "It restrains the state as well as Carpenter,"—the prisoner? And as there further observed, to hold otherwise, "it would be equivalent to saying to him, 'You are bound by this decision of the Court but the other party to it and its officers may ignore it'."

The law in force at time of defendants' conviction under which their commitments were given them prevails. They were, under the law, entitled to refuse even a pardon and serve their full terms, without increase of punishment during such terms. Then, shall they, under the guise of an execution which under the statute

only prescribes a minimum time for execution, —(*not a time limit*) have the period prescribed in their former sentences and commitments shortened, in order that the state, which (as said in the Carpenter case) has the same restrictions upon it as the defendants, may blot out their existence before the termination of their former sentences. The statutes must all be read together. By doing so the construction we urge gives effect to all and the equal protection guaranteed defendants under the law is thereby recognized.

To hold otherwise would not only be to create penalties not authorized by statute, but to take from defendants rights guaranteed under the law of the land, *and in violation of the fourteenth amendment to the Constitution of the United States.* Shall it be said that the penalties given them under former convictions shall be taken from them and the greater or shortening their lives given instead? Their execution under the verdict of the jury may eventually be certain (if not reversed) in time anyway, but whether defendants for the convenience of the State must surrender rights exclusively their own (as held in *State v. Carpenter*) and thereby reduce both time and uncertainty, is for them and not for the State to say, whether the quick execution would be preferable to one delayed until the several years' imprisonment under

former convictions may end, like the acceptance of a pardon (as said by Mr. Chief Justice Marshall in *U. S. v. Wilson, supra,*) it is ". . . a deed, to the validity of which, delivery is essential, and delivery is not complete without acceptance." The sentence attempted to be fixed for execution prior to termination of defendants' terms of imprisonment, is void and inoperative because of the date fixed therefor to defendants' prejudice.

But we are told in the opinion that "The section (1576 O. L.) does not purport to exempt defendants from trial and judgment during the confinement in the penitentiary." The fault in this logic, when carried to its ultimate conclusion, is that to accept it as treated, would be to hold that the courts may do anything not forbidden by statute. No one will assert that common law crimes are enforcible in this state,—a statute is first required. We do not claim a prisoner is exempt from trial for other crimes; but insist that the trial and ultimate effect must be had according to law. The accused cannot be legally tried while in the jurisdiction of the warden of a state prison in whose charge he may be placed by statute. The trial must be had either after defendants' release from such prison by expiration of his term, or by acceptance of a pardon, or other process by which he may be taken from the warden's jurisdiction, whether tem-

porarily or permanently; and that convicted under the second offense he is entitled to the benefit of the law respecting the time when the execution of the sentence may be had.

The statement used in the opinion of the Court, so common in use with reference to it being shocking if the sentence could not be executed without awaiting the expiration of former sentence is but to beg the question. *Petio principii.* It assumes the major premise in place of establishing one upon which to base an argument. Nor does it license crimes with immunity as the Court states it. The criminal must suffer the penalty as by law prescribed. The question here goes to what *is* prescribed. The fallacy of the reasoning invoked may be clarified by asking how the Court's reasoning would apply if capital punishment were abolished, as it has been in the past in this state, also in one-third of the states in the Union, and in most of the other civilized nations of the globe?

The rule of law is aptly stated in *Ex. Rel. v. Meyers,* 44 Mo. 280, as follows:

"Courts have no common law jurisdiction in felonies, and powers they exercise are conferred by statute only." Continuing, "Separate sentences can only be passed upon the prisoner in the cases *and in the manner* pointed out by statute." It is also observed in this connection, that "In England, where the criminal practice is

largely founded on the common law, a different rule may prevail."

In that state, as appears in *Ex parte Allen*, 196 Mo. 226, the statutes provide for execution in case of death sentences without awaiting the expiration of former sentences. We have no statutes to that effect, Section 1576, Oregon Laws, being the only provision on the subject, except the section providing that the execution shall take place not less than thirty days after judgment entered, making the provision of these statutes exclusive of any other proceeding. No maximum time limit is fixed by this or any other provision of the statute, leaving this provision when considered in connection with Section 1576, with which it is consistent, to be carried out in the manner as in Section 1576 provided. As we have before stated, it will be found that in all states where the execution is upheld prior expiration of a previous sentence (unless a pardon duly accepted is ~~bad~~ had) place a maximum limit upon the date to be fixed for the execution, as for example in the State of New York, where the limit is placed at four months after judgment, and in California where a statute makes provision for trial and execution of sentences in capital cases committed by prisoners.

In the states and countries where capital punishment is not in force, *ad hominem* reasoning would hardly be available; in fact it

should be relegated to its proper sphere,—the law making bodies. But if to be presented on that line, it is met with the suggestion that, as shown by the commitments, defendants are serving sentences for the type of felonies in the commitments specified,—for a term of years only, defendant Willos, for example, for seven years, of which he has served about one-third the time allotted. Had the errors complained of not been incurred at the trial the verdicts against defendants could and probably would have been either for second degree or fixed at life imprisonment. This would have added, at his age, many years to the penalty already fixed under the previous conviction. To further illustrate: Assume one is serving a life sentence; there is always a reasonable chance for a "life timer", as with others, if demeanor and subsequent information justify it, of the sentence being materially commuted, but should one serving a life sentence add to it the crime of another unjustifiable homicide he must suffer the *increased* probability of having to serve for life without executive clemency. Such is the effect in states and countries where the infliction of death penalties are not in force.

The period of confinement in the penitentiary between the date of sentence, whether between the expiration of the twenty day period in which the prisoner must under the statute be re-

turned to the warden after sentence, *and* the weeks and months during which the defendants under the sentence of the Court must be imprisoned in the penitentiary and there remain until the date of execution is necessarily, under Section 1576 Oregon Laws, in every sense of the word an *imprisonment* and carries with it their added restrictions, customarily invoked respecting the confinement of prisoners sentenced to execution under the rules of the prison. It is so recognized in every definition and application of the term from the earliest history of legal jurisprudence to the present time. On this point Blackstone said:

> "Every confinement of a person is *imprisonment*, whether it be in a common prison, or in a private house, or even by forcibly detaining one in the public streets." See Webster's International Dictionary, p. 1083.

Then must it not follow that confinement in the Oregon penitentiary is an "imprisonment" within the meaning of Section 1576 of the Code? To say nothing of the fixing of the date for execution, how can an exception be read into the statute quoted, the result of which must result not only in the shortening of the former terms of imprisonment but the lives of defendants as well?

The punishment to be undergone prior to taking the life of a convict under sentence of death

was not uncommon in England prior to the birth of our Republic; and it was from this judicial grandparent that our laws are said to have emanated. Common law crimes are abolished, it is true, but much of the procedure is embodied in our statutes and thus enforcible. The provision in Section 1576 of Oregon Laws, as to *when* consecutive sentences begin to run, is one of them.

A fair sample of the punishment inflicted and enforced in England for centuries preceding our government, is the sentence, by the Court, imposed upon Robert Charnock and two other defendants, March 16, 1696, in which it was provided:

> "That you go from hence to the place from which you came and that from thence you be drawn upon a Hurdle to the place of execution, where you are severally to be hanged by the neck and cut down alive; your bowels and ..... to be cut from your bodies; and to be burnt in your view; your heads to be cut off, your bodies respectively to be divided into four parts; which heads and quarters are to be at the King's disposal. And God have mercy upon your souls."

It will be observed from the sentence imposed upon the defendants, as above quoted, that more than one step was to be taken before the final execution took place. While in this instance it is probable that no great length of time inter-

vened before the final execution was closed, it is a well known historical fact that there were innumerable instances in which punishment by imprisonment, with tortures accompanying it, took place during the period of time after sentence and preceding the date fixed for execution, a more humane remnant of which is the provision in Section 1576 of our code.

These conditions continued in force until the beginning of the eighteenth century, the echoes of which, in many instances, may be found in the various statutes throughout this country at the present time. Horrible as the penalties inflicted prior to adoption of our Federal Constitution, not only in England but here as well, the system had the support of practically the entire world, and for the many centuries preceding the institution of this government, it was contended and believed that to abolish the barbarous punishments inflicted "would be shocking to all sense of justice and *public security.*" Its supporters were as ardent and sincere in that regard as are those who during this assumed enlightened time earnestly support the extreme penalties, some of which include unnecessary cruelties in various ways, much of which are not only in violation of law, but clandestinely effectuated under the guise of prison rules, in many instances in violation of not only of the reason and spirit, but of the letter of the law.

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In the foregoing pages we have endeavored to point out what we deem prejudicial errors in the trial of this cause, as sustained in the opinion on appeal, which as pointed out we believe to be inconsistent and in conflict with the statutes, law of the land and opinions of this Court as previously promulgated, which if permitted to remain undisturbed, will evolve precedents not heretofore deemed wise under our system of jurisprudence and which continued will confront us with the dangers of our constitutional safeguards being eventually and "substantially frittered away." (*Hill v. People*, 16 Mich. 351.)

It has not been deemed, nor is it our province to discuss the guilt or innocence of the accused; that is for the jury, the consequences of whose verdict must necessarily depend upon whether given under instructions of the trial court in full conformity with the law.

That this was not done in the present case we believe we have fully shown, and as said by Mr. Justice Harlan, speaking for the Court, in *Crain v. United States*, as quoted above:

> "The defendant may be guilty and may deserve the punishment imposed upon him by the Court. But it were better that he should escape altogether than that the Court should sustain a judgment of conviction of an infamous crime *where the record does not clearly show that there was a valid trial.*"

Believing defendants have not had a valid trial; that they have been deprived thereby of rights guaranteed by our statutory *and* fundamental laws of the land, manifestly to the prejudice of defendants' rights, a rehearing is earnestly requested.

Respectfully submitted,

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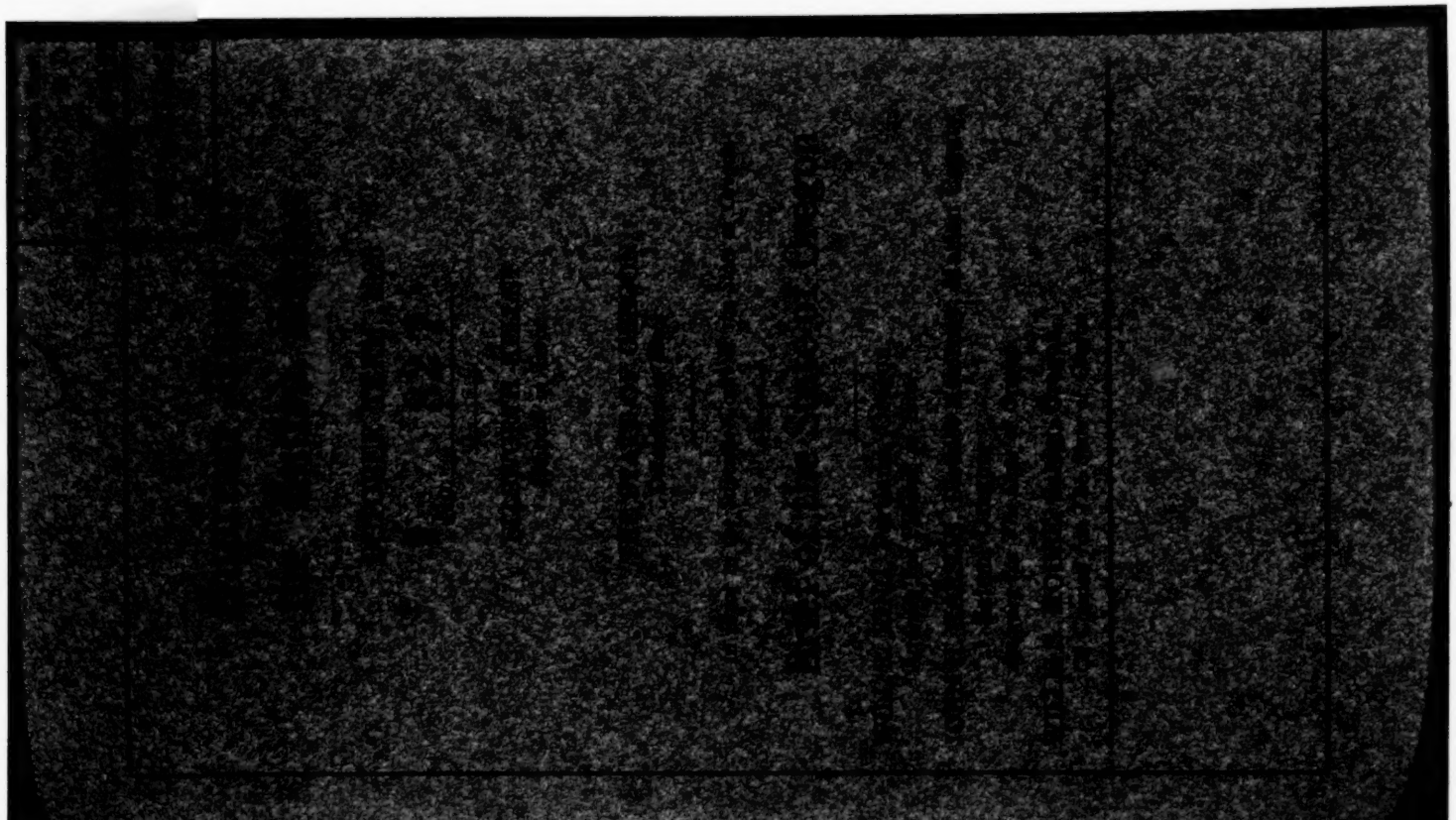

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1926

No._____

ELLSWORTH KELLEY
Plaintiff in Error

vs.

THE STATE OF OREGON
Defendant in Error

In Error to the Supreme Court of the State of Oregon

Brief of the State of Oregon

STATEMENT

Ellsworth Kelley, plaintiff in error, James Willos and Tom Murray were jointly indicted by the Grand Jury of Marion County, Oregon, for the crime of murder in the first degree under the provisions of Section 1893, Oregon Laws, reading as follows:

> "If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree."

At the time of the commission of the crime set forth in the indictment, plaintiff in error and the two others accused with him were prisoners in the Oregon State Penitentiary at Salem, Oregon, and the crime was committed by them in their escape from that institution. John Sweeney, named in the indictment, was a guard at the institution and was slain in his attempt to prevent the escape.

Plaintiff in error was arraigned upon the indictment in the manner prescribed by the laws of Oregon, and upon such arraignment he entered a plea of not guilty to the indictment. The cause was then set for trial as to plaintiff in error and James Willos jointly indicted with him. The record shows that the cause came on regularly for trial, the plaintiff in error at all stages of the trial appearing in person and by Hon. Will R. King, one of his attorneys. Upon trial the jury returned into court a verdict of guilty as charged in the indictment without recommendation. Thereafter, and on Friday, October 30, 1925, plaintiff in error was sentenced to pay the penalty of death, as by the law provided. Judgment was entered on the same day.

Notice of appeal to the Supreme Court of Oregon was filed by plaintiff in error in the Circuit Court of the State of Oregon for the County of Marion on November 19, 1925, thereby initiating a proceeding to review the judgment in the cause in the Supreme Court of Oregon.

Upon the appeal the Supreme Court of Oregon affirmed the judgment of the trial court. 247 Pac. 146. After the denial of two petitions for a rehearing by the

Supreme Court of Oregon, plaintiff in error brings this cause to the Supreme Court of the United States upon writ of error allowed by the Chief Justice of the Supreme Court of Oregon.

POINTS AND AUTHORITIES

I.

The Supreme Court of the United States will recognize and be governed by the rule of practice in a state court prescribing the requirements to be observed in order to save a question for review in that court.

Erie Railroad Co. vs. Purdy, 185 U.S. 148;

Hulburt vs. Chicago, 202 U. S. 275, 281;

Dreyer vs. Illinois, 187 U. S. 71-77 to 80;

Barbour vs. Georgia, 249 U. S. 454;

Louisville & Nashville R. R. vs. Woodford, 234 U. S. 46, 51;

Layton vs. Missouri, 187 U. S. 356.

II.

On error to a state court the Supreme Court of the United States will not consider an alleged Federal question when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered, not being necessarily involved in the determination of the cause.

Harding vs. Illinois, 196 U. S. 78;

Union Mut. Life Ins. Co. vs. Kirchoff, 169 U. S. 103;

Levy vs. Superior Ct. 167 U. S. 177;

Messenger vs. Mason, 10 Wall. 510;

Jacobi vs. Alabama, 187 U. S. 133;

Layton vs. Missouri, 187 U. S. 356.

III.

The Supreme Court of Oregon not having decided a Federal question and none being necessarily decided against any specially set up claim of plaintiff in error, this court is without jurisdiction of the cause.

Klinger vs. Missouri, 80 U. S. (13 Wall.) 257.

IV.

To give the Supreme Court of the United States jurisdiction of this case because of a denial by the State court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time in the proper way. It must appear that the claim was made in the trial court because the Supreme Court of Oregon was only authorized to review the judgment for errors committed in the trial court.

Spies vs. Illinois, 123 U. S. 131-181;

Brooks vs. Missouri, 124 U. S. 394;

Baldwin vs. Kansas, 129 U. S. 52;

Jacobi vs. Alabama, 187 U. S. 133;

Harding vs. Illinois, 196 U. S. 87;

Thomas vs. Iowa, 209 U. S. 258;

Miller vs. Texas, 153 U. S. 535;

Erie Railroad Co. vs. Purdy, 185 U. S. 148;

Zadig vs. Baldwin, 166 U. S. 485-488.

V.

It is elementary that a federal question may not be imported into a record for the first time by way of assignments of error made for the purpose of review by this Court.

Manhattan Life Ins. Co. vs. Cohen, 234 U. S. 123;

Harding vs. Illinois, 196 U. S. 78.

VI

The contention that plaintiff in error was exempt from compulsory self-incrimination in the state court is not secured by any part of the Federal constitution, and therefore no federal question is raised.

Twining vs. New Jersey, 211 U. S. 78, 114;

Barrington vs. Missouri, 205 U. S. 483-486.

VII.

The conformity with the state constitution of the proceedings in the enactment of the law is a question for the determination of the state court.

Burt vs. Smith, 203 U. S. 129;

Haire vs. Rice, 204 U. S. 291;

Smith vs. Jennings, 206 U. S. 276.

VIII.

To try one already serving a sentence for crime involves no want of due process, nor is the jurisdiction of the trial court impaired by the manner in which the accused is brought before it.

Ker vs. Illinois, 119 U. S. 436; 7 Sup. Ct. Rep. 225;

Mahon vs. Justice, 127 U. S. 700; 8 Sup. Ct. Rep., 1204;

Pettibone vs. Nichols, 203 U. S. 192; 27 Sup. Ct. Rep 111;

Ex parte Lamar, 274 Fed. 160; 24 A. L. R. 864;

People vs. Groves (Cal. App.), 219 P. 1033;

People vs .Pratt, 78 Cal. 345; 20 P. 731;

Ex parte Ah Men (Cal.), 19 P. 380;

State vs. Owen (Or.), 244 Pac. 516.

IX.

A prisoner may be tried, convicted and sentenced for another crime committed either prior to, or during, his imprisonment — the penitentiary is no sanctuary.

21 R. C. L. pp. 1185-6;

Re Tranmer (Nev.), 126 P. 337; 41 L.R.A. (N.S.) 1095;

13 C. J., p. 919;

7 A. & E. Encyc. of Law (2nd. Ed.), 497;

State vs. Wilson, 38 Conn. 126;

Ex parte Lamar, 274 Fed. 160; 24 A.L.R. 864, at

Clifford vs. Dryden, 31 Wash. 545, 72 P. 96;

Arrowsmith vs. State, 131 Tenn. 480; 175 S. W. 545; L.R.A. 1915-E. p. 363;

State vs. Keefe, 17 Wyo. 227, 98 P. 122; 22 L.R.A. (N.S.), 896;

State vs. Griffith (W. Va.), 107 S. E. 302;

People vs. Sichofski (Cal. App.), 208 P. 340;

People vs. Groves (Cal. App.), 219 P. 1033;

Chapman vs. Scott, (D.C.) 10F. (2nd), 156, aff'd, (C.C.A.), 10F. (2nd) 690; pet. for wr. of cert. denied, 46 Sup. Ct. Rep. 354.

X.

The plaintiff in error can be legally sentenced to be, and can be legally, hanged for commission of the murder charged in the indictment, notwithstanding the fact that he is a convict confined in the penitentiary under unexpired sentence of imprisonment for the commission of other crime. He has no vested constitutional right to serve out his unexpired sentence.

Re Tranmer (Nev.), 126 P. 337; 41 L.R.A. (N.S.) 1095;

Peri vs. People, 65 Ill. 17, at 22;

People vs. Majors, 65 Cal. 138, 3 P. 597;

Brown vs. State (Tex.), 95 S.W. 1039;

Huffaker vs. Com. 124 Ky. 115, at 118; 98 S.W. 331;

State vs. Keefe (Wyo.), 22 L.R.A. (N.S.) 896; 98 P. 122;

Thomas vs. People, 67 N.W. 226;

People vs. Flynn (Utah), 26 P. 1114;

Gaines vs. State (Tex.), 53 S.W. 623;

People vs. Hong Ah Duck, 61 Cal. 387;

Ponzi vs. Fessenden (U.S.), 258 U.S. 254; 42 Sup. Ct. Rep. 309; 22 A.L.R. 879;

Coleman vs. State (Tex.), 33 S.W. 1083;

Kennedy vs. Howard, 74 Ind. 87, at 89;

Singleton vs. State, 71 Miss. 782; 42 A.S.R. 488; 16 So. 295;

Ruffin vs. Com., 62 Va. 790;

13 C. J., p. 919;

7 A. & E. Encyc. of Law (2nd. Ed.) 497;

Ex Parte Lamar, 274 Fed. 160; 24 A.L.R. 864, at 874;

State vs. Tranmer, 39 Nev. 142; 154 P. 80;

Ex parte Clark, 85 Cal. 203; 24 P. 726;

Chapman vs. Scott, supra.

XI.

Although the judgment and sentence in this case provide that the sheriff should deliver plaintiff in error within twenty days to the warden of the peniteniary and that plaintiff in error be hanged on a certain date thereafter, the interim between the delivery and the execution does not constitute "imprisonment" as contemplated in Section 1576, Oregon Laws. The confinement during the interim is but a mere incident and is in no sense punitive.

State vs. Wilson, 38 Conn. 126, at 135;

Re Tranmer (Nev.), 126 P. 337; 41 L.R.A. (N.S.), 1095, at 1101;

In re Herron, 77 N. J. L., 315; 72 A. 133, 16 C. J., 1332.

16 C.J. 1332.

XII.

As to the "due process of law" that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense.

Frank v. Mangum, 237 U. S. 326.

ARGUMENT

Our argument in this proceeding will be based upon several successive propositions, most of which go to the jurisdiction of this court to entertain the writ herein. We urge to the court that this proceeding must fail for any of the following reasons:

1. No Federal question was involved in the decision of the Supreme Court of Oregon and none was decided by it.

2. No title, right, privilege or immunity was "specially set up or claimed" by the plaintiff in error in the trial court so as to present any matter for review.

3. The contentions here made by plaintiff in error were never raised in the record under the state practice in such manner as to call upon the Supreme Court of Oregon to decide them and, therefore, they cannot now be urged.

4. The only claim of a Federal question remotely referred to in the record is the application of the Fourteenth Amendment to the Constitution of the United States to certain phases of the case under such circumstances as to make the claim frivolous.

We are satisfied that this court will view with amazement the record herein and the flimsy character of the material with which plaintiff in error will labor. It may be that the fact that this is a capital case induced a leniency in the issuance of the writ of error that would not be indulged in another sort of case. The humanness of such an attitude is readily understand-

able, but if the Supreme Court of Oregon could find no reversible error in the record under the state law and practice, and did not divide on any question in the case, and there was no federal question presented properly or decided, it is not so easily understood how it can reasonably be expected that with the same record and governed by the same laws and rules of practice this court can find and declare error where the Supreme Court of Oregon could not. Whether capital or otherwise, this case in its final analysis is to be disposed of under the same law that regulates and controls any other kind of criminal case. We do not wish to be taken as even seeming to reprove in any sense the course that was followed in passing this cause on to this court, but we do confess a lingering suspicion that the writ herein was improvidently allowed. There is not a substantial proposition offered to this court for determination anywhere in the record, and though it be contended there is a possibility of a doubt, still there is not enough matter tendered by the record for one to comprehend what it was all about in the first place.

We are prevented from complying strictly with the requirements of the rules of this court respecting form and arrangement of our brief for the reason that this brief is being written without having a copy of the brief of plaintiff in error or a copy of the printed record herein.

In elaboration of the summary which opens this argument, we shall be required to anticipate the argument of plaintiff in error and answer each assignment of error separately. In view of the fact that, excepting the first, every assignment of error urged by the plaintiff in error is not effectually presented by the record, under the law and rules of appellate procedure in Ore-

gon, we shall first mention as briefly as possible a few of the matters of such procedure whereby the fatally defective condition of the record may be clearly exposed.

An appeal to the Supreme Sourt of Oregon in a criminal cause is taken by notice thereof in writing served upon the County Clerk and District Attorney. (Oregon Laws, Sections 1610 and 1611). Thereafter the record must be transmitted from the trial court to the Supreme Court under the provisions of Section 1621, Oregon Laws, which reads as follows:

> "Upon appeal being taken, the clerk of the court where the notice of appeal is filed, must within 30 days thereafter, or such further time as such court, or the judge thereof may allow, transmit a certified copy of the notice of appeal, certificate of cause, if any, and judgment roll to the clerk of the supreme court.'

The certificate of cause mentioned in this statute is a certificate of the trial judge or a judge of the Supreme Court that in his opinion there is probable cause for the appeal. (Oregon Laws, Section 1617), and this certificate operates as a supersedeas or stay of judgment. Oregon Laws, Sections 1619 and 1620).

The judgment roll mentioned in the statute is provided for in Section 1582, Oregon Laws, which reads as follows:

> "Immediately after the entry of judgment, the clerk must prepare and annex together the following papers, which constitute the judgment roll:—
>
> "1. The indictment and demurrer, if there be one;

"2. A copy of the journal entry of the plea, the trial and verdict, and of any order involving the merits and necessarily affecting the judgment;

"3. A copy of the journal entry of the judgment;

"4. The bill of exceptions, if there be one.

"And in all cases the clerk must complete and indorse such judgment roll in the manner prescribed in subdivision 3 of section 208 of the Code of Civil Procedure."

These three things, the certified copy of the notice of appeal, certificate of cause and judgment roll, constitute the entire record of the case in the Supreme Court of Oregon and together are known as the transcript on appeal, as declared by the Supreme Court of Oregon in the case of State vs. Reinhart, 26 Or. 466 at 468.

The law then provides the limits of the power and authority of the Supreme Court of Oregon on the appeal in the following sections:

Section 1625, Oregon Laws:

"Upon an appeal the judgment or order appealed from can only be reviewed as to questions of law appearing upon the transcript;"

And Section 1626, Oregon Laws:

"After hearing the appeal the court must give judgment, without regard to the decision of questions which were in the discretion of the court below, or to technical errors, defects, or exceptions which do not affect the substantial rights of the parties;"

And Section 1627, Oregon Laws:

> "The appellate court may reverse, affirm, or modify the judgment or order appealed from, and must, if necessary or proper, order a new trial."

From these provisions of the laws of Oregon it will be seen that the judgment roll is the principal part of the transcript on appeal. (We might interpolate here that the original transcript on appeal in the Supreme Court of Oregon in this cause was lost while in the care of the attorney for plaintiff in error and it was necessary to supply the record with a new one. This will explain the unusual dates of filing in the Supreme Court of Oregon appearing on the transcript as certified to this court).

In this cause the several requirements of the judgment roll have been met and these all appeared in the transcript certified in response to the Writ of Error herein. No objection has ever been seriously urged by plaintiff in error to the regularity of any matter appearing from the judgment roll herein except as disclosed by the bill of exceptions. The whole basis of the appeal to the Supreme Court of Oregon was the bill of exceptions. This document became, and was, very important on the appeal and we shall, therefore, hastily deal with a few of the essentials of a bill of exceptions in Oregon.

The bill of exceptions in this case is in the form of a "skeleton bill", as it has been irreverently dubbed in the practice. It is made up in the trial court and must be settled and allowed by the trial judge. As stated by the course in the case of State vs. Clements, 15 Or. 237, at 246, respecting this sort of bill:

"The practice in regard to making up a bill of exceptions, ought to be thoroughly understood in this state. There has usually been but one course pursued regarding it ever since there has been an organized judiciary here; and that has been to make one general statement, reciting the general proceedings of the trial, a statement of the exceptions as they occurred, with sufficient of the evidence or other matter to explain them. That course must still be observed, unless changed by the legislature. It will not do for counsel to have transmitted here mere memoranda, in detached parts, of the proceedings had in a case, and expect that this court will consider the matter."

This statement of the law was substantially reiterated in the case of O'Connor vs. Van Hoy, 29 Or. 505, at 511.

The bill of exceptions must distinctly and affirmatively show error. The Supreme Court will not presume that the trial court erred and it will not hunt error. These statements of the law are supported by the following Oregon cases:

Thompson vs. Backenstos, 1 Or. 17, at 19;

Thompson vs. Uglow, 4 Or. 369, at 373;

Henderson vs. Morris, 5 Or. 24 at 29;

Monroe vs. Northern Pacific, etc., Co., 5 Or. 509, at 514;

Richards vs. Fanning, 5 Or. 356, at 360;

Parker vs. Monteith, 7 Or. 277, at 285;

Lahey vs. Knott, 8 Or. 198, at 201;

State vs. Ducker, 8 Or. 394, 34 Am. Rep. 590;

Tenny vs. Mulvaney and Bemis, 9 Or. 405, at 410;

Ladd vs. Sears, 9 Or. 244, at 248;

Long vs. Lander, 10 Or. 175, at 177;

State vs. Lee Yan Yan, 10 Or. 365, at 367;

Newby vs. Rowland, 11 Or. 133, at 134;

Tucker vs. Salem Flouring Mills Co., 13 Or. 28, at 30;

Danvers vs. Durkin, 14 Or. 37, at 38;

Coffin vs. Taylor, 16 Or. 375, at 378;

State vs. Brown, 28 Or. 147, at 162 and 167;

Cranor vs. Albany, 43 Or. 144, at 148;

Hill vs. McCrow, 88 Or. 299, at 308;

Daniels vs. Foster & Kleiser, 95 Or. 502, at 509;

Cathcart vs. Marshfield, 89 Or. 401, at 405;

O'Kelly vs. Territory, 1 Or. 51, at 58;

Jennings vs. State, 1 Or. 290 at 292;

State vs. Gallo, 18 Or. 423, at 425;

Carney vs. Duniway, 35 Or. 131, at 135;

State vs. Magers, 35 Or. 520, at 527;

State vs. Jancigaj, 54 Or. 361, at 363;

Pacific Laundry Co. vs. Pacific Bridge Co., 69 Or. 306, at 311;

State vs. McClard, 81 Or. 510, at 515;

State vs. Chapin, 74 Or. 346, at 350;

State vs. Gardner, 33 Or. 149, at 152;

Sharp vs. McCargar, 114 Or. 435, at 443.

It is further provided that the bill of exceptions should point out the error complained of in the admission of evidence and make it plain that under no combination of circumstances could the testimony have been admissible.

Pacific Laundry Co. vs. Pacific Bridge Co., 69 Or. 306, at 311.

Referring to the court's instructions, it has also been said that the rule is that error will not be presumed, and if an instruction asked, which correctly states the law, is refused, it is the duty of appellants to show by the bill of exceptions that no instruction was given embodying it, or set out in the bill of exceptions all the instructions given by the court, that it may appear whether the refusal to give the instruction was error.

Ayer vs. Moon, 59 Or. 599, at 602;

Dawson vs. Pogue, 18 Or. 94, at 99.

Another well grounded rule is that

> "Affidavits or other matters dehors the judgment roll as defined by the statute, are not part of the record, and cannot be considered on appeal from the judgment, unless incorporated into a bill of exceptions and thus made a part of the record." Shaughnessy vs. Kimball et al., 106 Or. 484, at 487;

Farrell vs. Oregon Gold Co., 31 Or. 463, at 472;

State vs. Chee Gong, 17 Or. 635;

Thompson vs. Backenstos, 1 Or. 17, at 18.

And generally, the following two rules of appellate practice are apt and applicable to this case:

> "If a party desires to raise a question in the Supreme Court of Oregon as to the competency of evidence offered in the trial court, or of any other supposed irregularity of that court, either of omission or commission, he must, at the time, make his objection, and thereby obtain a ruling of the court, and if adverse, he must save an exception and bring it to the Supreme Court by a proper bill of exceptions.

State vs. Foot You, 24 Or. 61.

> "It is not error simply, but error legally excepted to that constitutes ground for reversal in the Supreme Court of Oregon.

Kearney vs. Snodgrass, 12 Or. 311.

Applying these requirements to the record in this case would lead to the conclusion that there is not an argument from one end of it to the other. With them as a background it is readily discernible that the opinion of the Supreme Court of Oregon herein is based upon the law and the statutes of Oregon, and could not have been other than it was. They explain in a large measure the whole opinion of the court.

It is probable that our effort in this behalf has made up seem tedious in the extreme, but our purpose is to show that the law and rules of practice in Oregon prevented our Supreme Court from considering most of the points urged by plaintiff in error; and inasmuch as this court is dealing with the same record and is governed by the same law and rules of practice, we felt that the origin and substance of the same might be of help and also of consequence to this court.

We shall now discuss each assignment of error separately, applying to each the foregoing rules of appellate procedure in Oregon and the law as laid down by this court, to which reference has been made in our Points and Authorities.

ASSIGNMENT NO. 1

In this assignment it is urged by the plaintiff in error that the Supreme Court of Oregon erred in holding that Section 1903, Oregon Laws, was constitutional and not in violation of the Fourteenth Amendment to the Constitution of the United States, and in not holding that said provision in the Oregon Laws as enacted was illegal and void and in violation of the Bill of Rights of the Oregon Constitution and of the Bill of Rights of the Federal Constitution as well. The Supreme Court of Oregon in its opinion herein did not notice the contention here made by plaintiff in error.

This statute (Section 1903, Oregon Laws), reads as follows:

> "Every person convicted of murder in the first degree shall be punished with death, except when the trial jury shall, in its verdict, recommend life imprisonment, in which case the penalty shall be life imprisonment; provided, however, that this act shall take effect as soon as and whenever the constitutional provisions of section 36 of article I of the constitution of the state of Oregon relating to the death penalty, and any amendment or amendments thereto, will permit.'

The question sought to be raised by this assignment was never presented to the trial court. It is not in the record of the trial court, but it first appears in the assignments of error filed by the plaintiff in error on his appeal to the Supreme Court of Oregon and is set forth in his brief in that court as Assignment No. 16. The plaintiff in error has broadened his objection to the statute in his assignment to the Supreme Court of the United States by including in the latter assignment

that the provision of the law is in violation of the Fourteenth Amendment to the Constitution of the United States. As yet it has not been suggested by plaintiff in error in what manner Section 1903 was not enacted in conformity with either the Bill of Rights of the Constitution of the United States or of Article I of the Constitution of the State of Oregon. However, the Bill of Rights to the Constitution of the United States has been held by this court many times as operating on the Federal Government, and not a restriction on the states, and, therefore, any objection to Section 1903 of Oregon Laws arising out of rights assumed to be safeguarded by the Bill of Rights to the Constitution of the United States cannot be maintained. As to the failure of said provision of the law to have been enacted in conformity with Article I of the Constitution of the State of Oregon, we submit this is not a Federal question. (Points and Authorities VII.).

On three occasions recently in the following cases:

State vs. Rathie et al., 101 Or. 339, at 362;

State vs. Hecker, 109 Or. 520, at 532;

State vs. Evans, 109 Or. 503, at 507,

the Supreme Court of Oregon passed upon the constitutionality of Section 1903, Oregon Laws, now under attack in this court. In all these cases it was held by the Supreme Court of Oregon that the act in question was constitutional. And in one of these cases (State vs. Hecker, 109 Or. 520) it is said that, inasmuch as Section 37 of Article I of the Constitution of Oregon, reading as follows:

> "The penalty for murder in the first degree shall be death, except when the trial jury shall in its

> verdict recommend life imprisonment, in which case the penalty shall be life imprisonment."

is self-executing, the enactment of Section 1903, Oregon Laws, was really a work of supererogation on the part of the Legislature of Oregon. This constitutional amendment has not been attacked by the plaintiff in error, and no reference has thus far been made to it.

As constitutional questions cannot be raised for the first time in the assignment of errors in this court, it is unnecessary to advert to the Fourteenth Amendment to the Constitution of the United States and is applicability to the law in question. It may be said, in passing, that the law now under attack and the constitutional amendment which accompanies it are similar to other death penalty laws of the states. It cannot seriously be urged that the State of Oregon is without power to fix the penalty of death for the crime of murder, and having fixed that penalty in the manner provided by law of the state, and the law embodying the penalty having been sustained with respect to its constitutionality, there remains nothing for the decision of this court on the assignment.

ASSIGNMENT NO. 2

It is next assigned as error that the Supreme Court of Oregon erred in depriving plaintiff in error of his rights under the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States by refusing to give certain instructions in connection with the law of self-preservation and self-defense and in connection with cruel and unusual punishment said to have been inflicted upon plaintiff in error at the Oregon State Penitentiary. These requested instructions are set out at length further in the assignments of error herein. The first requested instruction referred to by plaintiff in error reads as follows:

> "I further instruct you, that under the State and Federal Constitutions, cruel and unusual punishment shall not be inflicted, and that if you find under the evidence in this trial, that the same was inflicted upon the person of this defendant within a reasonable time prior to, and immediately before the alleged prison break, and that defendant was living in enforced fear and belief of unlimited repetition thereof, and that his escape was the only means of avoiding the same, you should find the defendant, "not guilty".

The Supreme Court of Oregon adverted to this requested instruction in its opinion, although it was unnecessary to do so in view of the condition of the record. The court there said in connection with this request that plaintiff in error is not the judge of the question of punishment; and even if he had the right to escape, he would not have the right to kill. This was a prosecution for the murder of a guard at the Oregon State Penitentiary by plaintiff in error and two

other convicts. The requested instruction with this in mind is absurd. That he should be acquitted of the crime of murder committed by him in escaping from the prison if escape were the only means of avoiding cruel and unusual punishment is a vicious proposition of law to ask the court to declare. The bill of exceptions does not show that the jury was not instructed on all phases of the law concerning which the plaintiff in error contended there was some testimony, and in the absence of this showing it is to be presumed that the trial court did its duty in the matter.

The second requested instruction which it is claimed was not given by the trial court reads as follows:

> "Some evidence has been admitted showing certain statements and admissions made by defendants, but not under oath. I instruct you that while signed statements or admissions are admissible, and may be considered in your deliberations, they are to be viewed with caution, and in considering them you may take into consideration all the circumstances under which made, whether under fear, hope of reward, or any other circumstance surrounding the same which may during the trial come to your attention."

The bill of exceptions does not disclose but what a similar instruction embodying the same proposition was given to the jury by the court and, hence, it was impossible for the Supreme Court of Oregon to say that error was committed. The presumption being otherwise, this assignment is not available to defendant in error. We suggest, however, that the assertion in the instruction that signed statements and admissions of an accused are to be viewed with caution is not a correct exposition of the law, either in Oregon or elsewhere.

The third requested instruction about which complaint is made reads as follows:

> "The right to qualify a verdict of murder in the first degree or guilty of murder in the first degree by adding the words, "We recommend life imprisonment", is thus conferred upon the jury in all cases of murder in the first degree. The law does not itself prescribe any rule defining or circumscribing the exercise of the right, but commits the whole matter of its exercise to the judgment and conscience of the jury. This being the law, you are not limited in your deliberations to the testimony adduced at the trial, nor is it dependent upon mitigating or palliating circumstances, you are accorded the privilege, under the law, of making such recommendation for whatever reason your conscience may dictate; and if after taking into consideration the entire evidence, whether such evidence shall be sufficient in your judgment to establish the insanity defense relied upon beyond a reasonable doubt or not, you are at liberty to take into consideration any or all evidence, if any, adduced for that purpose in determining whether in the exercise of your discretion or conscience with reference to such recommendation, you may return a verdict with recommendation for life sentence as I have stated, or disregard the same and return such verdict whether for or without a recommendation of life imprisonment. And in this connection, I instruct you, that as to how far considerations of age, sex, illness, if any, or mental impairment, if any, or intoxication, of whatever nature or kind, if any, or human passion, or weakness, or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist, which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, all of which

committed by the constitution of this state and legislative enactment based thereon to your sound discretion, and to your sound discretion alone."

This requested instruction is virtually a copy of part of the opinion of this court in the case of Winston vs. U. S. 172 U. S. 302-312. In the main it is applicable under the Oregon Law. Plaintiff in error, however, inserted in the instruction this amazing clause: "* * you are not limited in your deliberations to the testimony adduced at the trial * *." As the Supreme Court of Oregon pointed out in its opinion, this clause was a direct invitation to the jury to violate its oath (Oregon Laws, Section 131) to "give a true verdict according to the law and the evidence as given them on the trial." This request is in the same category as the others, inasmuch as the bill of exceptions does not show what the court actually instructed the jury.

These exceptions were never properly presented to the Supreme Court of Oregon to require its attention, and not being properly presented under the rules of procedure in the State Court, this court has precluded itself from considering them. The record does not show any special claim made by plaintiff in error under the Constitution of the United States. No constitutional or Federal question respecting these requested instructions was seriously argued by plaintiff in error in the Supreme Court of Oregon. But even if the matter were properly presented, the giving, or failure to give, instructions of this character does not raise a Federal question.

The only instance any reference is made to the Constitution of the United States in any of the requested instructions is in the first request above set

forth, wherein it is said that "* * * Under the State and Federal Constitutions cruel and unusual punishment shall not be inflicted." This reference is of no value to plaintiff in error on two grounds. The first is that the provision in the Federal Constitution referring to punishment is the Eighth Amendment which does not operate upon the State, and the second is that the provision is directed to the fixing of punishment by law by the legislative body and has no application to individual action or conduct in any event. (In re Kemmler, 136 U. S. 447).

ASSIGNMENT NO. 3

Plaintiff in error urges upon this assignment that the Supreme Court of Oregon erred in declining to pass upon an objection lately found by plaintiff in error to the instructions to the jury of the trial court. As before stated, the plaintiff in error did not attach to the bill of exceptions herein the instructions actually given the jury by the trial court. There is before this court, and there was filed in the Supreme Court of Oregon, a document purporting to contain all the instructions given by the trial court to the jury in the case. These instructions were filed in the Supreme Court of Oregon long after the record on appeal was made. They had no place in the record of the Supreme Court of Oregon, and they have no place in the record before the Supreme Court of the United States. It appears conclusively on the record, and this assignment admits, that no exception was taken to the instructions given the jury by the trial court at the time they were given, as required by law. It was then thought that the instructions were entirely fair, and it was only after months of close application that the plaintiff in error was able to discover what he contends was an erroneous instruction.

The Supreme Court of Oregon, in its opinion in this cause, declared in conformity with its prior decisions that inasmuch as no exception had been taken to the instruction in question, it was powerless to review it. Since the Supreme Court of Oregon was unable under its rules and decisions to pass upon the question sought to be presented, we urge to this honorable court that the objection cannot be heard here.

ASSIGNMENT NO. 4

This assignment relates to the introduction in evidence of an extra-judicial statement made by plaintiff in error to the District Attorney of Marion County, Oregon, at the Oregon State Penitentiary. Plaintiff in error asserts that the Supreme Court of Oregon erred in holding that plaintiff in error was lawfully "examined" under the circumstances. Again, the rules of procedure established by the laws and decisions of court of Oregon prevent an investigation of this question. It is the duty of the State in a criminal trial in Oregon to establish to the trial court that a confession made by an accused is voluntary and not brought about through fear, force, or the hope of reward. This is a preliminary matter of law for the trial court to determine. In this instance the trial court determined from the showing of the State that the alleged confession was properly obtained and that it was admissible. The bill of exceptions does not contain this showing, and does not challenge its sufficiency otherwise, and, consequently, there was nothing for the court to decide on the objection, and the Supreme Court of Oregon so held in its opinion herein.

Reference to the last paragraph of Exception Number Eleven in the bill of exceptions upon which this assignment is based will show that the objection to the offer of the confession or admission is that the plaintiff in error was not "apprised of his constitutional rights of counsel." This is the only reference to the constitution in the objection. Constitution of Oregon, Article I, Section II, is substantially the same as the Sixth Amendment to the Constitution of the United States respecting an accused's right of counsel. They both

refer to criminal prosecutions, and not to matters going on before. The Sixth Amendment has nothing to do with the matter and the plaintiff in error would, therefore, be relegated to whatever rights he might have under the state constitution. Moreover, the mere averment that he had not been apprised of his constitutional right of counsel is insufficient to raise the question. (Points and Authorities II.)

But assuming it has been raised on the record, still under the ruling of this court in Barrington vs. Missouri, 205 U. S. 483-486, the question is not subject to review in this court.

We suggest, too, in this regard that the reference to the Fourteenth Amendment to the Constitutional of the United States in the assignment of errors herein is belated, and not having been urged before cannot be effectual now. (Points and Authorities V.).

ASSIGNMENT NO. 5

This assignment is based upon the provision in the judgment of the trial court that within twenty days of the date of the judgment (October 30, 1925), that the Sheriff of Marion County, Oregon, should deliver the plaintiff in error to the Warden of the Oregon State Penitentiary for the execution of the sentence. This provision of the judgment is in conformance with the statute, Oregon Laws, Section 1602-1, excepting where that statute has been affected in minor particulars by subsequent legislation with reference to the change from superintendent to Warden of the institution. We assume that it is argued that the interim between the judgment and the execution is imprisonment and consequently, under the provisions of Section 1576, Oregon Laws, the judgment should have provided that the execution be deferred until the expiration of a prior twenty year sentence which the plaintiff in error was serving at the time of the murder. This statute, (Section 1576, Oregon Laws), reads as follows:

> "If the defendant is convicted of two or more crimes, before judgment on either, the judgment must be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of such crimes; and if the defendant be in imprisonment upon a previous judgment on a conviction for a crime, the judgment must be that the imprisonment must commence at the expiration of the term limited by such previous judgment."

The plaintiff in error does not attack the above law as being unconstitutional, but he does declare that the construction placed upon it by the Supreme Court of Oregon abridges his rights under the Fourteenth

Amendment to the Constitution of the United States. Taking the propositions of plaintiff in error as they come, it is suggested that the interim between judgment and execution is not imprisonment in its broad sense, but it is a detention incident to the judgment and execution. It is in no sense punitive. (Points and Authorities XI.). Therefore, the stipulation as to the interim is not violative of the law quoted.

The next question would then be whether or not the plaintiff could be legally executed prior to the expiration of his twenty year sentence. We have cited in our Points and Authorities (VIII, IX and X) many cases that either directly or on principle sustain the conclusion reached by the Supreme Court of Oregon respecting the above statute.

The Supreme Court of Oregon, in passing upon questions sought to be raised in this assignment and in construing the statute above set forth, held that the imprisonment provision thereof had nothing whatsoever to do with the infliction of the punishment of death. This construction of this statute is in line with the construction of a somewhat similar statute by the Supreme Court of Nevada in the case of Re Tranmer (Nev.), 126 P. 337, 41 L.R.A. (N.S.) 1095. The statute in Nevada differs from the statute of Oregon in that the second sentence of the Oregon statute does not appear in the Nevada statute. In construing the word "imprisonment" in the Nevada statute, however, the Supreme Court of Nevada had this to say:

> "The word 'imprisonment' in the statute denies the contention of counsel for petitioner, for the reason that, if a death punishment were inflicted, it would present a different character of punish-

ment than designated in the statute in question, because the statute contemplates, even if there was merit in counsel's contention on this point, a sentence of imprisonment, and not a death penalty."

This construction of the statute by the Supreme Court of Oregon is consonant with reason and authority. So being, the decision of the Supreme Court of Oregon construing its own statute in the manner in which it was done in this case, presents no federal question for the consideration of this honorable court.

ASSIGNMENT NO. 6

The record is wholly insufficient to raise the question of the jurisdiction of the trial court of the person of plaintiff in error. Under the statutes of Oregon (Sections 1621 and 1582), on appeal to the Supreme Court of Oregon, it is not necessary to show how jurisdiction of the person of an accused attached. He is presumed to be in court by virtue of proper process until the contrary is shown. (State vs. Reinhart, 26 Or. 468). The record before this court establishes unquestionably that the plaintiff in error at all stages of the trial from the arraignment to judgment was in the custody of the Sheriff of Marion County, Oregon, the officer of the Court. Nowhere in the record is this disputed. There is a copy of a motion and affidavit "for an arrest of judgment" in the printed record which suggests that a deputy warden of the Oregon State Penitentiary was the immediate custodian of the plaintiff in error at the trial and that plaintiff in error was detained during the trial at the prison. In this connection, it may be said that the Oregon State Penitentiary is located at Salem, Oregon, where plaintiff in error had his trial and at a distance of no more than two miles from the courthouse in which the trial was conducted.

It is not intimated, and it cannot be shown, that plaintiff in error did not have a full and fair opportunity to make his defense at the trial regardless of the manner of his being physically produced in court.

No plea to the jurisdiction of the court was interposed, but, on the other hand, a plea of "not guilty" was entered and the record does not show that any objection to the jurisdiction of the trial court was at

any time made by the plaintiff in error throughout the whole trial and for nearly two months after judgment.

This matter of questioning the jurisdiction of the court over the person of plaintiff in error is patently an afterthought.

We can virtually demonstrate our statement in this respect. Oregon Laws, Section 1560, relating to arrest of judgment in a criminal cause, reads as follows:

> "A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant on the plea of a former conviction or acquittal. It may be founded on either or both of the causes specified in subdivisions 1 and 4 of section 1491, and not otherwise. The motion must be made within the time allowed to file a motion for a new trial, and both such motions may be made together, and heard and decided at once or separately, as the court may direct."

Section 1491, mentioned in the foregoing statute, declares the grounds of demurrer to an indictment, the pertinent subdivisions thereof reading as follows:

> "The defendant may demur to the indictment when it appears upon the face thereof either,—
>
> "1. That the grand jury by which it was found had no legal authority to inquire into the crime charged because the same is not triable within the county;
>
> "4. That the facts stated do not constitute a crime."

It, therefore, appears that an arrest of judgment can only be allowed for defects in the indictment appearing on the face of the indictment. The objection urged in

the motion did not appear on the face of the indictment and could not be availed of in a motion in arrest. But there is an additional statutory reason that the motion should not be noticed.

The statute above set forth requires that the motion be made within the time allowed to file a motion for a new trial. The statute relating to new trials in criminal causes is known as Section 1559, Oregon Laws, and reads as follows:

> "Chapters VII and VIII of title II of the Code of Civil Procedure shall apply to and regulate exceptions and new trials in criminal actions, except that a new trial shall not be granted on the application of the state."

Section 175, Oregon Laws, is a part of Chapter VIII of Title II of the Code of Civil Procedure, the salient feature of which reads as follows:

> "A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed within one day after the entry of the judgment sought to be set aside, or such further time as the court may allow * * *."

No allowance of additional time for filing the motion was ever made by the court and by filing the motion on December 24, 1925, plaintiff in error was approximately fifty-three days late. The trial court naturally overruled the motion because it was both ill-timed and not well taken.

So much is bad enough, but the record is even worse. Under the practice in Oregon and the decisions of the Supreme Court which we have heretofore mentioned, it is necessary to incorporate in the bill of

exceptions all affidavits, motions and the like that otherwise would not appear in the record on appeal. The motion in arrest in this case would necessarily need to be part of the bill of exceptions to merit consideration by the Supreme Court of Oregon. Nothwithstanding the practice and the decisions of the court, plaintiff in error did not incorporate the motion in his bill of exceptions, but instead merely took a certified copy of the motion, affidavit and order and filed it originally in the Supreme Court of Oregon. The Supreme Court did not notice the motion, affidavit and order, in conformance with its prior decisions respecting matters of the kind, and passed over the point sought to be raised. It is assumed that that was the action of the court, although it could have read it and deemed it so utterly devoid of merit as not to justify its mention.

The plaintiff in error now lugs the same motion, affidavit and order into this court, and bases, and will base, on them his entire argument as to lack of jurisdiction of his person and ask this court to take cognizance of a matter that never has been properly before the lower court. In short, plaintiff in error seeks the aid of this court on a gratuitous record and urges that the judgment below be reversed on a point that was never, and can never, rightfully be before the state court.

Assuming, however, that the matter is presented for determination, we urge that no lack of jurisdiction of the person appears. It seems that a distinction is to be drawn between jurisdiction of the subject matter and jurisdiction of the person. The former is never waived, whereas, the latter can be waived by failure to object. The argument will be advanced that since the plaintiff

in error was a convict in the Oregon State Penitentiary, an institution directly under the executive branch of our state government it was legally impossible for the person of the plaintiff in error to be surrendered to the process of the court in this case. To date, plaintiff in error has not cited any authority to sustain his contention, and we have found none.

There is no law of the State of Oregon which requires any different procedure in a criminal prosecution of a convict from the procedure employed in cases involving others. There is no law respecting the manner in which a convict is to be produced in court to stand trial, and there is no law that he shall not be produced. On these matters the Oregon Law is absolutely silent. In fact, the situation in Oregon is similar to the situation respecting Federal prisoners' being tried in state courts for public offenses mentioned by the court in the case of Ponzi vs. Fessenden, 258 U. S. 254, wherein it is said that although there is no express authority for the Attorney General of the United States to permit the removal of a Federal prisoner for a state trial, his right to do so cannot be doubted.

Or, again, as said by the court in the case of Gaines vs. State (Texas), 53 S. W. 624:

> "Appellant excepted to the action of the court in having him brought from the penitentiary at Rusk (he being confined there on another case) to stand his trial in this case, it being contended that it was not competent for the state to do this. There is nothing in this contention. While we know of no procedure authorized by legislation to bring a defendant from the penitentiary to some court for trial in another case, yet there is no law to the contrary, and such has been the usual practice; and we fail to see how a defendant can be heard to com-

plain that the penitentiary authorities surrendered him to the local authorities for trial on some indictment pending against him. The legislature has authorized the penitentiary board to make certain rules in regard to the conduct of the convicts confined and under their charge, and we understand the prison authorities have provided a rule recognizing the authority of district judges to issue writs for prisoners confined in the penitentiary to be brought before the court for trial in any case that may be pending against them. This would seem to be sufficient authority to bring the prisoner before the court. At any rate, in the absence of some express provision prohibiting this, we fail to see how the prisoner can complain. The Constitution guarantees him a speedy trial, and at his request he would be entitled to be tried in cases pending against him, although he might be confined in the penitentiary. On the other hand, if he should be serving a term of punishment in the penitentiary that extended over a number of years, and at the same time an indictment should be pending against him for some graver offense,—it might be rape or murder,—there would be no means to bring him to trial until the sentence in the case which he was serving had terminated, and perhaps in the meantime the witnesses against him might die or be so scattered as that a prosecution could not be maintained by the state.'

The presence of the plaintiff in error in court in this case is proof enough that he was surrendered by proper authority for trial and the full and complete opportunity afforded him to make his defense removes any question of due process in the matter. We take it that that this court will not concern itself with the methods or arrangements of local authority with respect to the disposition for trial of a state prisoner where the trial of such prisoner was conducted in accordance with "the

law of the land" and not in violation of any unquestioned Constitutional rights.

The argument that the presence of the plaintiff in error at trial should have been procured through a writ of habeas corpus is sufficiently answered by reference to Oregon Laws, Section 627, wherein it is provided that every other writ of habeas corpus except ad subjiciendum is abolished.

For all that appears in this record, there is nothing to indicate that the very things plaintiff in error argues should have been done were not in fact done. But whether done or not done, we submit no Federal question has been raised and this court is without jurisdiction to review the judgment on this assignment.

The remaining matter in the assignments of error is an address made by the attorney for plaintiff in error at the time a new date was fixed by the trial court for the execution of the judgment, the former date therefor having passed during the time the cause was on appeal to the Supreme Court of Oregon. Nowhere else in the record will this address be found. It was an occurrence subsequent to the judgment sought to be reviewed in this proceeding and is in no wise connected with it. Why the record here should be burdened with it is not apparent. There is no authority for it under either the Oregon law or practice and, consequently, it cannot be considered.

It is obvious from the opinion herein of the Supreme Court of Oregon (247 Pac. 146) that no federal question was considered or decided by it. The judgment of the trial court was affirmed on grounds sufficient under the state law and practice without reference to any supposed Federal question. It is not an instance of

studied refusal to determine the rights of a person under the Constitution or laws of the United States, and the judgment did not necessarily determine a federal question. It is simply an instance of a wholly defective record and the inevitable result of attempting to build on it. The decision of the Supreme Court of Oregon was foregone under the circumstances and the record is worse here than it was in the state court.

In conclusion, we reiterate that no matter has been urged by the plaintiff in error or disclosed by the record that has the remotest tendency to invest this court with jurisdiction of the cause and the power to review. We submit, therefore, that the judgment herein ought not to be disturbed, but, on the other hand, the writ should be dismissed for want of jurisdiction.

Respectfully submitted,

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WILLIS S. MOORE,
Of Counsel for the State of Oregon.